No. 02-809

In The
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

JOSEPH JERMAINE PRINGLE,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF RESPONDENT

STEPHEN E. HARRIS
Public Defender

NANCY S. FORSTER
Deputy Public Defender

SHERRIE GLASSER*
Assistant Public Defender

OFFICE OF THE PUBLIC DEFENDER
6 St. Paul Street, Suite 1400
Baltimore, Maryland 21202-1608
(410) 767-8474

Counsel for Respondent

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where drugs are found hidden in the backseat armrest of an automobile next to the rear seat passenger, does probable cause exist to arrest the front seat passenger?

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STATEMENT OF THE CASE

The State of Maryland charged Respondent with the offense of possession with intent to distribute cocaine pursuant to Md. Code Annotated, Art. 27 §286(a)(1) (1957, 1996 Repl. Vol., 2002 Supp.).[1] Prior to the trial on the merits, a hearing was conducted in the Circuit Court for Baltimore County to consider Respondent's motion to suppress evidence, including a statement, taken in violation of his constitutional rights.

Officer Jeffrey Snyder was the State's sole witness. He testified at the motion to suppress hearing. He stated that on August 7, 1999, while on routine patrol at approximately 3:16 a.m., he observed a 1987 Nissan Maxima traveling at a high rate of speed. (JA 5). He further noticed that the driver of the Maxima was not wearing a seat belt as required by Maryland law. (JA 5). Officer Snyder effectuated a stop of the car for the traffic violations. The Maxima was stopped on a lit residential street. (JA 7). There were three occupants in the car: the driver and registered owner, Donte Parlo; the front seat passenger, Respondent; and a rear seat passenger, Otis Smith. (JA 5-6, 41). Officer Snyder testified that he asked Mr. Parlo for his driver's license and registration. According to Officer Snyder, "I was talking to the driver and asking for his registration, that's when I saw the money in the glove box." (JA 12). After obtaining Mr. Parlo's license and registration, Officer Snyder ran the information through the Maryland State Department of Motor Vehicles

[1] Effective October 1, 2002, this statute was repealed and re-enacted, without substantive change, in Md. Code Annotated, Criminal Law Article, §5-602 (2002).

computer system. (JA 8). During this time, all occupants of the car remained "in their respective spots in the vehicle." (JA 9).

After obtaining the necessary information from the Department of Motor Vehicles, Officer Snyder proceeded back to the Maxima and asked Mr. Parlo to exit the car. (JA 9). Officer Snyder frisked Mr. Parlo after he exited the car and asked "him if he had any weapons on him." (JA 34). Mr. Parlo said that he did not and the pat-down revealed no evidence. (JA 34). Officer Snyder issued a "verbal warning" to Mr. Parlo while Mr. Parlo stood outside of the car. (JA 6). He then returned the license and registration to Mr. Parlo. Before Mr. Parlo could get back into his car, Officer Snyder inquired "if he had anything in the vehicle, any drugs, weapons, narcotics in the vehicle." (JA 10). Mr. Parlo responded that he did not. (JA 10). Officer Snyder then asked of Mr. Parlo "if he would mind that I search his vehicle." (JA 10). According to the officer, Mr. Parlo said "yes, go ahead." (JA 10).

Officer Snyder asked Respondent and Mr. Smith to get out of the car and take a seat on the nearby curb. (JA 35). Respondent and Mr. Smith did as they were told. Before they sat on the curb, however, Officer Snyder asked if either had any weapons on him and, when each responded negatively, Officer Snyder frisked each of them. (JA 37). The frisk of the two passengers bore no incriminating fruit. (JA 37). However, Officer Snyder removed Respondent's driver's license from his pants pocket. (JA 37). By this time, a back-up unit had arrived and the officer with that unit stood near Respondent, Mr. Smith, and Mr. Parlo while Officer Snyder conducted his search of the car. (JA 11). Officer Snyder first searched the driver's side of the car and made no discoveries. (JA 11). He then

proceeded to search the front passenger's seat area and "that's when [he] found the money in the glove box," which he had seen earlier when Mr. Parlo retrieved his documents. (JA 12).[2] Officer Snyder removed "the money" from the glove compartment and put it on the front seat. (JA 12). He then moved to the rear of the car.

Officer Snyder described the back seat as "flat" with the armrest in "the up position." (JA 40). He pulled down the armrest and found drugs "sandwiched" between the armrest and the back seat of the car. (JA 40-41). Specifically, he found "a clear plastic Ziploc baggie containing five smaller glassine baggies containing a white rock-like substance." (JA 13).[3] The drugs were in the rear seat area next to where Mr. Smith had been sitting. (JA 41). After discovering the drugs, Officer Snyder questioned each of the occupants, one at a time, beginning with the driver/owner, Mr. Parlo, in an attempt to discover who owned the drugs. (JA 42). Mr. Parlo provided Officer Snyder with no information. (JA 42). Officer Snyder then took Respondent to the other side of the street and questioned him, to no avail. (JA 43). Mr. Smith was then taken to the other side of the street and questioned, similarly, with no results. (JA 43). Officer Snyder testified that he told all three men that if he did not get an answer as to the ownership of the drugs, he would arrest all three and take them to the precinct. (JA 43). Respondent's testimony

[2] There was no testimony or documentary evidence presented at the motion to suppress hearing describing the amount or appearance of the money in the glove compartment.

[3] Chemical analysis of the rock-like substance revealed it to be cocaine.

in this regard did not differ from Officer Snyder's account of events. Respondent testified that, at the scene of the arrest, Officer Snyder said "if he didn't find out whose drugs they was, he was going to lock all three of [us] up." (JA 52). When none of the occupants of the car claimed ownership, Officer Snyder arrested all three.

According to Respondent, once at police headquarters, Officer Snyder told all three of the men, "I am going to give you one last chance to tell me whose drugs these are or I am going to charge all three you all with what I found." (JA 53). All three men were interviewed. (JA 46). Respondent confessed to ownership of the drugs and was the only one of the occupants charged with possessing them.

After hearing argument from counsel, the suppression court found that the search of the car was conducted pursuant to a validly obtained consent, ruling that "there was money in front . . . drugs in the back, both in arm's reach of [Respondent]," and, thus "the officer had probable cause to make the arrest as he did." (JA 69).

SUMMARY OF ARGUMENT

Both history and this Court's precedents mandate that a police officer may undertake the major intrusion of an arrest only upon individualized suspicion that a citizen is or has engaged in criminal behavior. Those precedents include instances in which multiple individuals are observed occupying a vehicle, suspicion has fallen upon one of those individuals, yet the police take action against other occupants of the car which comes within the ambit of the Fourth Amendment. Soundly rejecting the notion of

guilt by association, this Court has condemned such action by the police. In the present case, no grounds for individualized suspicion applied to Respondent. His arrest, therefore, contravened the Fourth Amendment.

The position of Petitioner not only treads upon individual liberties secured by the Bill of Rights, but also utterly fails to provide meaningful guidance to the police officer on the street. That position would condition the right to arrest upon the size and configuration of the involved vehicle, and thereby require the officer to make judgments and distinctions grounded on neither common sense nor principle.

This Court should reaffirm and apply the requirement of individualized suspicion, and hold that the total absence of facts pointing to Respondent's involvement in criminal activity rendered his arrest invalid.

ARGUMENT

I. WITHOUT MORE, PROBABLE CAUSE DOES NOT EXIST TO ARREST THE FRONT SEAT PASSENGER IN A CAR WHERE COCAINE IS FOUND HIDDEN IN THE BACKSEAT ARMREST NEXT TO THE BACKSEAT PASSENGER.

Individualized suspicion is a fundamental component of probable cause to arrest. Only two years ago, this Court had occasion to address the authority of police to make warrantless arrests. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). In determining the scope of that authority with respect to misdemeanor offenses, this Court was guided by

> 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing [of the Fourth Amendment],' *Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), since '[a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable.' *Payton v. New York*, 445 U.S. 573, 591, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (footnote omitted).

532 U.S. at 326. Those same considerations, as well as the Court's own precedents, must guide the Court here.

A. The historical foundations of the Fourth Amendment dictate the need for individualized suspicion before an arrest can be made.

An examination of the common law understanding of an officer's authority to arrest demonstrates that individualized suspicion was a core component. Numerous commentators on the subject have concluded that the framers of the Fourth Amendment feared that the newly created Congress would pass legislation permitting general warrants to serve as a basis for arrest or search. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 590 (1999) ("[T]he Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of

person and house by prohibiting legislative approval of general warrants.")[4]; Thomas K. Clancy, *The Role of Individualized Suspicion In Assessing The Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 489 (1995) ("[T]he historical record overwhelmingly supports the view that the Amendment was designed solely or primarily to address searches and seizures pursuant to a warrant because the colonials were concerned only about those actions."). This fear was well-founded given the experiences of the colonists in England just prior to leaving for the new world. These colonists were subjected to, *inter alia*, mandates of arrest "*per speciale mandatum domini regis*" – upon the fiat of the king. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 30-31 (1937).[5]

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[4] The most widely accepted meaning of "general warrant" was "a warrant that lacked specificity as to whom to arrest or where to search; for example, a warrant directing arrests of 'suspected persons' or a search of 'suspicious places.' " Davies, 98 Mich. L. Rev. 547 n. 12 (1999).

[5] Indeed, according to one commentator, these suspicionless seizures upon fiat of the king greatly influenced the text of Article 14 of the Massachusetts Declaration of Rights adopted in 1780 which, in turn, served as a model for the Fourth Amendment. Article 14 of the Massachusetts Declaration of Rights provided that "[e]very subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied *with a special designation of the person* or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws." E. Washburne, *Massachusetts Bill of Rights, Massachusetts Historical Society Proceedings, 1864-1865* (Boston, 1866), VIII, 312-313 (emphasis added).

The framers of the Fourth Amendment were also greatly influenced by several highly publicized English cases. In particular, in 1762, John Wilkes, then a member of Parliament, published, anonymously, a series of pamphlets called The North Briton, which criticized the policies of the Tory government. In response, Lord Halifax issued a general warrant to four messengers ordering them "to make strict and diligent search for the authors, printers, and publishers of seditious and treasonable papers, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers." Who should be arrested and what should be seized was left completely to the discretion of the messengers. In all, 49 persons were arrested. From this group, it was ascertained that John Wilkes was the author of The North Briton. Wilkes was arrested and later released due to his privilege as a member of Parliament. Wilkes and the other arrestees brought suit against the messengers for trespass. Wilkes prevailed and the English courts ruled that the general warrants to arrest and search violated the common law. Further, Wilkes won a verdict against the Secretary of State who had issued the general warrant. In that suit, Chief Justice Pratt, addressing the power of messengers "to search wherever their suspicions may chance to fall" and "where no offenders' names are specified in the warrant," stated "[i]f such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763). It was this hostility toward the arbitrary use of general warrants that animated the framing of the Fourth Amendment. *Payton v. New York*, 445 U.S. at 583 ("It is familiar history that

indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment.").

History also demonstrates that the framers had little or no concern with whether arrests were made without a warrant because of the very limited authority to arrest under such circumstances at common law. *See United States v. Watson*, 423 U.S. 411, 429 (1976) ("There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers.") (Powell, J. concurring). At common law, a peace officer could arrest without a warrant under three circumstances: for an offense committed or attempted in his presence; for commission of a felony if the arrestee was *actually guilty* of the felony; or if a felony *in fact* had actually been committed and there was "probable cause of suspicion" to believe the arrestee was the perpetrator. Davies, at 632.[6] Thus, at common law, arrests

[6] Amicus, Criminal Justice Legal Foundation (hereinafter CJLF), cites the common law "hue and cry" in support of its argument that the "common law did not require the constable to single out one individual from a group of suspects before making an arrest." Br. CJLF 10. Quite to the contrary, the common law process of soliciting civilian assistance to arrest suspected felons otherwise known as the "hue and cry" required that the description of the suspect be as detailed as possible. "If he knows the name of him that did it, he must tell the constable the same. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery . . . " 2 M. Hale, *The History of the Pleas of the Crown* 100-01 (1847).

based on probable cause *alone* were insufficient. The arresting peace officers had to know that a felony *in fact* had been committed as well as have probable cause to suspect that a particular person committed the felony.

In England, it was not until 1827, after the Fourth Amendment had been ratified, that the authority to arrest on probable cause alone was established. *Beckwith v. Philby*, 108 Eng. Rep. 585 (1827). The first reported American cases to endorse the probable cause standard for warrantless arrests appear to be *Russell v. Shuster*, 8 Watts & Serg. 308, 309 (Pa. 1844), and *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281 (1850). Davies, at 636-37. While the need to establish that a felony in fact had been committed was no longer necessary, the requirement of individualized suspicion remained.

B. Cases from this Court hold that individualized suspicion is a core component of probable cause to search or arrest.

As noted by Petitioner, Br. Pet. 12, the most complete explanation of probable cause was given by this Court in *Brinegar v. United States*, 338 U.S. 160 (1949), which, in part, defined probable cause as requiring "less than evidence which would justify . . . conviction" but "more than bare suspicion." *Brinegar*, 338 U.S. at 175. The Court was careful to point out that its definition of probable cause "seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" while at the same time "seek[s] to give fair leeway for enforcing the law in the community's protection." *Brinegar*, 338 U.S. at 176. The Court acknowledged that "room must be allowed for some mistakes" but that "those mistakes must be those of reasonable men,

acting on facts leading sensibly to their conclusions of probability" so that "law-abiding citizens [are not left] at the mercy of the officers' whim or caprice." *Id.* The Court in *Brinegar* qualified its statement regarding mistakes by referencing its decision in *Carroll v. United States*, 267 U.S. 132 (1925).

Carroll is most notable for developing the "automobile exception" to the warrant requirement. In *Carroll*, the police, without a warrant, stopped a car on suspicion that it contained illegal liquor. Given the impracticability of securing a warrant "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought," the Court ruled that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant." *Carroll*, 267 U.S. at 153-54. Notwithstanding this otherwise broad authority to search, the Court emphasized that the authority to search was not unlimited. "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.* Echoing this limitation, the Court in *Brinegar* held that "[t]his does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion." *Brinegar,* 338 U.S. at 177.

This Court revisited the question of probable cause in *Illinois v. Gates*, 462 U.S. 213 (1983), holding that a totality of the circumstances analysis must guide probable cause determinations. In so holding, the Court cited with approval *United States v. Cortez*, 449 U.S. 411 (1981). The

Cortez Court was concerned with whether a sufficient basis existed to justify an investigative stop of a car by border patrol officers. The Court in *Cortez* explained:

> But the essence of all that has been written is that the totality of the circumstances – the whole picture – must be taken into account. Based upon that whole picture the detaining officers must have a *particularized* and objective basis for suspecting the *particular* person stopped of criminal activity. . . .
>
> The idea that an assessment of the whole picture must yield a *particularized* suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances.
>
> * * *
>
> The second element contained in the idea that an assessment of the whole picture must yield a *particularized* suspicion is the concept that the process just described must raise a suspicion that the *particular* individual being stopped is engaged in wrongdoing.

Cortez, 449 U.S. at 417-18 (emphasis added).

In *Carroll, Brinegar,* and *Gates,* the Court reaffirmed the requirement of particularized suspicion. In those cases, the suspicion was focused on particular suspects and the issue was whether there was sufficient probable cause to believe that a crime had been committed. In the case now before the Court, the focus is not on whether there was probable cause to believe that a crime had been committed, for there plainly was. The question, rather, is

whether the police had probable cause to arrest Respondent, for whom there was no particularized suspicion of wrongdoing. The issue is not completely foreign to this Court as the path was trod over fifty years ago, was reaffirmed as recently as four years ago, and remains consistent with the common law requirement of particularized suspicion.

In *United States v. Di Re*, 332 U.S. 581 (1948), an informant named Reed notified government agents that he was to buy counterfeit gasoline ration coupons from a man named Buttitta at a specified location. The agents followed Buttitta's car to that location. When the agent approached the car, he found Buttitta in the driver's seat, Reed in the rear seat and Di Re in the front passenger seat. Reed was holding in his hand two counterfeit gasoline ration coupons. When asked, Reed stated that he obtained the coupons from Buttitta. The agent arrested all three occupants of the car and found counterfeit coupons during a search of Di Re. *Di Re*, 332 U.S. at 583.

Regarding the validity of Di Re's arrest, the Court first found it necessary to determine the particular offense for which Di Re had been arrested. *Di Re*, 332 U.S. at 591. *See Brinegar*, 338 U.S. at 175 ("[t]he standard of proof is accordingly correlative to what must be proved."). Given the absence of an applicable federal statute, the Court noted that "the law of the state where an arrest without warrant takes place determines its validity." *Di Re*, 332 U.S. at 589. The applicable New York statute allowed arrest for a misdemeanor if "committed in the arresting officer's presence," and, for a felony, the officer had to have

"reasonable grounds to believe *the person to be arrested* . . . committed [the felony]." *Di Re*, 332 U.S. at 589 n. 7 (emphasis added).[7] The Government, on appeal, conceded that Di Re could not have been arrested for the misdemeanor of knowingly possessing counterfeit gasoline ration coupons since Reed was the only person "who was found visibly possessing the coupons." *Di Re*, 332 U.S. at 592.

Turning to the existence of probable cause to arrest for the felony of possessing a known counterfeit writing with intent to utter it as true for the purpose of defrauding the Government, the Court noted that "[a]ll [the Government] had was [Di Re's] presence, and if his presence was not enough to make a case for arrest for a misdemeanor, it is hard to see how it was enough for the felony . . ." *Di Re*, 332 U.S. at 592. Pointing to the difference between the

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[7] The applicable Maryland statute is similar:

§2-202. Warrantless arrests – In general.

(a) *Crime committed in presence of police officer*. – A police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of a police officer.

(b) *Probable cause to believe crime committed in presence of officer*. – A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime.

(c) *Probable cause to believe felony committed*. – A police officer without a warrant may arrest a person if the police officer has probable cause to believe that a felony has been committed or attempted and the person has committed or attempted to commit the felony whether or not in the presence or within the view of the police officer.

Md. Code Ann., Crim. Proc. Art., §2-202 (2001).

misdemeanor offense of knowing possession of counterfeit gasoline ration coupons and the felony offense of possession with intent to utter as true, the Court explained:

> The relevant difference between [the misdemeanor] and [the felony] is that the former declares mere possession of a counterfeit coupon an offense, while the latter defines a felony which *consists not merely of possession but also of knowledge of the instrument's counterfeit character,* and also of intent to utter it as true. It is admitted that at the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. *Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.*

Di Re, 332 U.S. at 592 (emphasis added). Thus, like the Court of Appeals of Maryland in Respondent's case, the Court undertook an analysis of the character of the particular offense, including its relevant elements, for which the Government claimed to have probable cause to arrest.[8] Di Re's presence in the car, without more, was deemed

[8] The Court of Appeals of Maryland held that

> [T]o determine whether a police officer had probable cause to make a warrantless arrest, we evaluate the totality of the circumstances as to whether the facts and circumstances, with rational inferences derived therefrom, would lead a reasonable person to believe that a felony has been or is being committed. In a specific case, we apply the elements of the alleged offense to the facts and circumstances of that case to determine whether the police officer had probable cause to make a warrantless arrest of a particular individual for that specific offense. Pet. App. 20a-21a.

insufficient to give the officer probable cause to believe Di Re either knowingly possessed the ration coupons or knew of their counterfeit character.

Of particular importance to Respondent's case is the acknowledgment in *Di Re* that probable cause must be analyzed in relation to the elements of the offense for which one is arrested. As noted earlier, Respondent was charged with possessing cocaine with the intent to distribute. The Court of Appeals of Maryland thus examined, quite appropriately, the elements of this offense including "the exercise of actual or constructive dominion or control over a thing" and "knowledge of the controlled dangerous substance." Pet. App. 8a-9a.[9] The Court of Appeals of Maryland also reached the proper conclusion that, as in *Di Re*, Respondent's presence in the car where cocaine was found hidden in the back seat, without more, does not constitute probable cause to believe Respondent either knew of the presence of the drug or exercised any dominion or control over it.

The Court in *Di Re* also examined the facts for any inferences of participation by Di Re in the sale of the ration coupons by Buttitta to Reed that would establish probable cause to arrest for conspiracy. The Court held:

> There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration

[9] Even the dissenters in the Court of Appeals of Maryland acknowledged that "the arresting officer must comprehend that which 'possession of a controlled dangerous substance' entails." Pet. App. 39a.

> coupons from Buttitta, and none that he heard or took part in any conversation on the subject.
>
> * * *
>
> An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hideout but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings.

Di Re, 332 U.S. at 593.[10] Like the situation in *Di Re*, there was nothing *visibly* criminal done in Respondent's

[10] The U.S. Solicitor General asserts that "[e]ven if the drugs are hidden from plain view by the time they are discovered by police officers, the fact that a party attempted to conceal the drugs within the passenger compartment indicates that the contraband had been manipulated in the presence of the other occupants." Br. U.S. 15. There is absolutely no indication in the record that the cocaine found secreted in the back seat had been "manipulated" in anyone's presence, let alone in Respondent's.

presence, hence, no reasonable inference of participation by Respondent in the possession of the hidden cocaine could be drawn solely from his presence in the car.

Johnson v. United States, 333 U.S. 9 (1948), was decided one month after *Di Re.* In *Johnson,* an informant directed experienced narcotics officers to a specified hotel, claiming that persons inside were smoking opium. From the hallway in the hotel the officers detected the smell of burning opium and traced the odor to Room No. 1. Not knowing who occupied the room, the officers knocked and, when a voice from within asked who was there, one of the officers identified himself. After a slight delay, a woman answered the door and, after being told that the officer wished to speak to her "about this opium smell," she stepped back and admitted the officers. When the occupant denied that there was a smell of opium, the officer said, "I want you to consider yourself under arrest because we are going to search the room." The search turned up opium. *Johnson*, 333 U.S. at 12. The Government defended the search as one conducted incident to arrest. *Johnson*, 333 U.S. at 13.

Addressing the legality of the arrest this Court held:

> The Government, in effect, *concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant*. It points out specifically, referring to the time just before entry, "For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den." And it says, ". . . that when the agents were admitted into the room and found only the petitioner

> present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic." Thus *the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room,* gained only after, and wholly by reason of, their entry of her home.

333 U.S. at 16 (emphasis added; footnote omitted). Quite clearly, since the officers could not have focused their suspicion on Johnson in particular until *after* they had illegally entered her hotel room, the arrest was illegal. The Court, therefore, ruled that the officers did not have probable cause to arrest Johnson at the moment just prior to the entry. Although, as it turned out, Johnson was, in fact, alone in the room, the officers did not know this fact at the time of the arrest. If the hotel room had, in fact, been a "smoking den," then Johnson's mere presence, without more, would not have established probable cause for her arrest.

Wong Sun v. United States, 371 U.S. 471 (1963), also concerned whether probable cause existed to arrest a particular individual. Armed only with information from an untested informant that he had purchased an ounce of heroin from "Blackie Toy, [a] proprietor of a laundry on Leavenworth Street," police arrested James Wah Toy, the operator of a laundry establishment known as "Oye's Laundry" on Leavenworth Street. This Court soundly rejected the Government's argument that Toy's arrest was legal.

> We have held that identification of the suspect by a reliable informant may constitute probable cause for arrest where the information given is

> sufficiently accurate to lead the officers directly to the suspect. . . . That rule does not, however, fit this case. For aught that the record discloses, [the informant's] accusation merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one 'Blackie Toy's' laundry – and whether by chance or other means (the record does not say) they came upon petitioner Toy's laundry, which bore not his name over the door, but the unrevealing label 'Oye's.' Not the slightest intimation appears on the record, or was made on oral argument, to suggest that the agents had information giving them reason to equate 'Blackie' Toy and James Wah Toy – *e.g.*, that they had the criminal record of a Toy, or that they had consulted some other kind of official record or list, or had some information of some kind which had *narrowed the scope of their search to this particular Toy.*

Wong Sun, 371 U.S. at 480-81 (emphasis added). The Court compared the action of the police there to "the wholesale or 'dragnet' search warrant, which we have condemned." *Wong Sun*, 371 U.S. at 482 n. 9. Officer Snyder, in the instant case, similarly failed to narrow the focus of his arrest. Indeed, to the contrary, he admittedly arrested all three occupants *because* he could not determine who possessed the cocaine.

Di Re, Johnson, and *Wong Sun*, like Respondent's case, examined the existence of probable cause in the context of warrantless arrests and demonstrate the Court's adherence to the common law requirement of particularized suspicion.

The Court applied the same requirement of individualized suspicion in the context of a search conducted

pursuant to a warrant in *Ybarra v. Illinois*, 444 U.S. 85 (1980). After investigating information obtained from an informant, Illinois police officers obtained a warrant to search the Aurora Tap Tavern, a small, one-room bar. *Ybarra*, 444 U.S. at 88. The probable cause detailed in the warrant application indicated that the bartender of the tavern was engaged in the sale of heroin which he kept behind the bar. *Ybarra*, 444 U.S. at 88. The warrant authorized the search of the tavern as well as the person of 'Greg,' the bartender, for evidence of possession of narcotics. *Ybarra*, 444 U.S. at 88.

Seven or eight officers proceeded to the tavern to execute the warrant. Once there, they advised all patrons of their purpose and further stated that they were going to conduct a "cursory search for weapons" on each of the patrons. *Ybarra,* 444 U.S. at 88. Ybarra was standing in front of the bar when he was frisked twice. *Ybarra*, 444 U.S. at 89. During the second frisk, the officer found heroin in a cigarette pack taken from Ybarra's pants pocket. Ybarra challenged the authority of the police, while executing a valid search warrant, to search his person absent any information in the warrant casting suspicion upon him. *Ybarra,* 444 U.S. at 89. The Court reversed Ybarra's conviction and held:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. *But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person*.

> This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

Ybarra, 444 U.S. at 91 (emphasis added). As applied to Respondent's case, *Ybarra* is important for two reasons. First, it clearly confirms that individualized suspicion is an irreducible component in the probable cause equation. Second, mere proximity in time and place to one committing a crime is insufficient, by itself, to constitute probable cause. Thus, because Officer Snyder admittedly could not narrow his suspicion to Respondent and relied solely on Respondent's presence in the car where drugs were discovered, there was no probable cause justifying Respondent's arrest.

C. The need for individualized suspicion prohibits arresting all occupants of a car based solely on the discovery of drugs in a hidden compartment inside the car.

Petitioner concedes here that "suspicion did not focus on a particular individual to the exclusion of others." Br. Pet. 25. Nevertheless, Petitioner asserts that Officer Snyder properly arrested all of the occupants because "a common sense inference can be drawn that *any or all* of the occupants have knowledge of the drugs found in the car" and it can be inferred "that persons traveling together in a private passenger car know each other and are engaged in a common enterprise." Br. Pet. 17-18 (emphasis added). Petitioner cites a number of cases in support of

these asserted "common sense inferences" claiming that the cases are "factually analogous." *See, e.g., New York v. Belton*, 453 U.S. 454 (1981); *United States v. Hensley*, 469 U.S. 221 (1985); *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). Br. Pet. 17.

However, these cases are not analogous at all and, the distinctions between them and the case at bar are critical. First, the legality of the arrest was not at issue in any of the cases cited by Petitioner. Thus, the Court had no occasion to pass on the existence, *vel non,* of probable cause. Second, in each of the cases cited by Petitioner, the contraband found within the car stopped by the police, unlike the hidden drugs in Respondent's case, was in *plain view* of *both* the driver and the passenger. Thus, had the issue in these cases concerned the legality of the arrests, the fact that both the driver and passengers had knowledge of and control over the contraband surely would have constituted probable cause to arrest. *Belton,* 453 U.S. at 455-56 (1981) (Officer smelled burnt marijuana and saw, in plain view, on the floor of the car an envelope marked 'supergold.'); *Hensley*, 469 U.S. at 224 (Officer "stepped up to the open passenger door of Hensley's car and observed the butt of a revolver protruding from underneath the passenger's seat."); *Allen,* 442 U.S. at 164 ("[T]he case is tantamount to one in which the guns were lying on the floor or the seat of the car in plain view of the three other occupants of the automobile.").[11] When contraband is within the plain view and control of all occupants of a vehicle, the arrest of all occupants within the vehicle is

[11] The Court, in *Allen,* noted that, at trial, counsel referred to the .45-caliber automatic pistol as a "cannon." *Allen,* 442 U.S. at 165 n. 24.

fully consistent with *Di Re*. In *Di Re*, the Court rejected the argument that probable cause to arrest existed because, *inter alia*, "the alleged substantive crime is one which does not necessarily involve any act *visibly* criminal." *Di Re*, 332 U.S. at 593 (emphasis added).

The *Allen* case is inapposite for an additional reason. *Allen* concerned an issue of evidentiary relevancy. The jurors were instructed, pursuant to a New York statute, that they could infer possession of a weapon from presence in the car. Allen challenged the constitutionality of that statutory presumption as applied to the facts in his case. Finding the statute constitutional, the Court held that the presumption was permissive rather than mandatory. In assessing whether the inference was permissive or mandatory, the Court looked to whether there was a rational connection between the fact proved (presence) and the fact presumed (possession). In concluding that there was a rational connection, the Court stated that

> . . . the facts strongly suggest that Jane Doe was not the only person able to exercise dominion over [the guns]. The two guns were too large to be concealed in her handbag. The bag was consequently open, and part of one of the guns was in plain view, within easy access of the driver of the car and even, perhaps, of the other two respondents who were riding in the rear seat.

Allen, 442 U.S. at 164 (footnotes omitted). The Court held that "it is surely rational to infer that each of the respondents was fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over the weapons." *Allen*, 442 U.S. at 164.

What is significant, and relevant to Respondent's case, is the comparison drawn by the *Allen* Court between the presumption available in *Allen* to that found unconstitutional in *United States v. Romano*, 382 U.S. 136 (1965). *Allen,* 442 U.S. at 157. In *Romano*, the defendant was charged, *inter alia*, with possessing an illegal liquor still after Government agents executing a search warrant found Romano standing a few feet from an operating still. As to that charge, the judge instructed the jury that "the presence of the defendant at the site of an illegal still 'shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury.'" *Romano*, 382 U.S. at 138. This Court affirmed the reversal of Romano's conviction for possession finding that the mandatory presumption within the statute was unconstitutional. What the Court stated regarding the statutory inference is relevant here:

> . . . if there was 'no rational connection between the fact proved and the ultimate fact presumed, *if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience*. . . . [W]here the inference is *so strained as not to have a reasonable relation to the circumstances of life as we know them* it is not competent for the legislature to create it as a rule governing the procedure of courts.'

Romano, 382 U.S. at 139, quoting *Tot v. United States*, 319 U.S. 463, 467-68 (1943) (emphasis added). Thus, in striking down the statute, the Court found that inferring possession from mere presence near the still was arbitrary and strained in light of common experience and "the circumstances of life as we know them." If, as Petitioner argues, "common sense inferences about human behavior

and everyday life can and should be factored into the probable cause determination," Br. Pet. 16, *Romano* suggests that it is not within the realm of common sense to draw an inference of possession from mere proximity. That connection is even more tenuous when, as in the case *sub judice*, the item Respondent was deemed to possess was concealed.

While conceding that the case does not concern probable cause to arrest, Br. Pet. 18, Petitioner also relies on *Wyoming v. Houghton*, 526 U.S. 295 (1999), as analogous both in its facts and rationale. Br. Pet. 19. But *Houghton* involved the validity of the search of a passenger's purse found inside an automobile for which probable cause to search for contraband existed. The police had probable cause to search for drugs in the car in which Houghton was a passenger. When she exited the car, Houghton left her purse on the back seat. The searching officer looked inside the purse and discovered contraband. *Houghton*, 526 U.S. at 297. The Court in *Houghton* was concerned with the scope of a search under the *Carroll* doctrine, specifically, whether or not that doctrine would permit the search of a passenger's personal belongings which could conceal the object of the search. *Houghton*, 526 U.S. at 300. It did not involve the far more intrusive arrest of the passenger as is the issue in the case at bar. It was in this context that the Court, in *dicta,* stated that car passengers "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Houghton*, 526 U.S. at 304-05. From this benign statement in *dicta*, Petitioner leaps to the conclusion that this inference of "common enterprise" would allow the police to conduct a "severe intrusion on an individual's liberty." *Atwater v. Lago Vista*,

532 U.S. at 365 (O'Connor, J., dissenting). No matter how Petitioner attempts to phrase it, at bottom Petitioner urges that an arrest may be based on nothing more than guilt by association, a proposition which this Court soundly rejected almost 35 years ago. *Sibron v. New York*, 392 U.S. 40, 62 (1968) ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.").

Furthermore, the assertion of the U.S. Solicitor General challenging the "continuing vitality of *Di Re*" in light of this Court's decision in *Houghton*, Br. U.S. 7, is curious. The *Houghton* opinion itself reaffirmed the continued vitality of *Di Re.* The Court distinguished *Di Re* and *Ybarra*, declaring that those cases turned on "the unique, *significantly heightened* protection afforded against searches of one's person," and noted that "[s]uch traumatic consequences are not to be expected when the police examine an item of personal property found in a car." *Houghton*, 526 U.S. at 303 (emphasis added). Moreover, in his concurring opinion, Justice Breyer emphasized "certain limitations" upon the scope of the *Houghton* ruling stating:

> Obviously, the rule applies only to automobile searches. Equally obviously, the rule applies only to containers found within automobiles. And *it does not extend to the search of a person found in that automobile*. As the Court notes, and as *United States v. Di Re*, 332 U.S. 581, 586-87, 68 S.Ct. 222, 92 L.Ed. 210 (1948), . . . makes clear, the search of a person, including even 'a limited search of the outer clothing,' *ante,* at 1302 (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct.

> 1868, 20 L.Ed. 889 (1968)), is a very different matter in respect to which the law provides "significantly heightened protection."

Houghton, 526 U.S. at 308 (Breyer, J. concurring) (emphasis added). That "very different matter" referred to by Justice Breyer is now before the Court.

It bears pointing out that Petitioner's "practical" approach, Br. Pet. 7, to determining the existence of probable cause to arrest in this case is anything but practical. Petitioner's argument that all occupants of a car may lawfully be arrested when drugs are found in a hidden compartment within the car is qualified. According to Petitioner,

> The determination whether there is probable cause to arrest multiple occupants of a car might not be quite so clear in all cases. In other scenarios, the vehicle may be larger than the one here or configured differently than a sedan, the stop may be during daylight hours, or the drugs may be found in a locked console, in the trunk, or even on the person of one of the occupants.

Br. Pet. 24. As a further caveat, Petitioner notes that probable cause to arrest all persons within a vehicle would not exist "where there is no nexus among the persons, such as in a cab, bus, or other common carrier." Br. Pet. 25. Thus, it would appear that whether probable cause can be found to exist, by Petitioner's calculus, turns on such niceties as the size and configuration of the vehicle. Presumably, occupants of compact cars will be subject to virtually automatic arrest while occupants of mobile

homes, recreational vehicles, vans, sport utility vehicles, and stretch limousines will enjoy greater rights.[12] Petitioner's method of determining whether there is probable cause to arrest is no method at all. It is unworkable and provides no guidance to police in calculating whether or not they can arrest.

The U.S. Solicitor General takes a different approach and declares that "the presence of drugs – without more – immediately reveals criminal activity" supporting "an inference that all of the car's occupants were aware of, and hence involved with, the drugs," Br. U.S. 15 (citation omitted). Such an assertion ignores this Court's repeated cautions against dragnet arrests.[13] In only very limited circumstances has this Court condoned broad, suspicionless searches and seizures. And even then, it has done so only "[w]hen such 'special needs' – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion . . . " *Chandler v. Miller*, 520 U.S. 305, 313 (1997). *See, e.g., Board of Education v. Earls,* 536 U.S. 822 (2002) (drug testing of students who participate in extra-curricular activities); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student

[12] According to the Federal Highway Statistics Report, in 2001, there were 18,222,321 vans and 24,297,697 sport utility vehicles on the road. Together they total approximately 24% of the total number of vehicles on the road.

[13] Moreover, it reveals a total disregard for the realities of daily life. According to the U.S. Census for the year 2000, 15,634,051 people car pooled to work each day. This constituted 12.2% of the workforce. Members of those car pools would, no doubt, be astonished to learn that they had best search the car and its occupants before accepting the ride, lest they be subject to arrest for possessing an item of contraband hidden somewhere, indeed anywhere, within the car.

athletes); *Treasury Employees v. Von Raab,* 489 U.S. 656 (1989) (drug testing for United States Customs Service employees); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints aimed at removing dangerous drivers from the road).

The only "special need" asserted by the U.S. Solicitor General for such broad-based authority to arrest absent individualized suspicion seems to be to assist the police in "facilitat[ing] further investigation . . . " Br. U.S. 30. Indeed, Amicus, CJLF asserts that such sweeping arrests are "essential to the continuing investigation of a crime," so as to allow for such further police tactics as custodial interrogation. Br. CJLF 19. The argument of Petitioner and Amici in this regard is reminiscent of that made by the State in *Davis v. Mississippi*, 394 U.S. 721 (1969), where the State defended the round-up of 24 African American men for the purpose of fingerprinting them during an ongoing investigation into an alleged rape. The men were released without being charged after the fingerprinting was completed. *Davis*, 394 U.S. at 722. The State, while admitting that the detentions were conducted without warrants and without probable cause, nevertheless contended that "the detention occurred during the investigatory rather than accusatory stage and thus was not a seizure requiring probable cause." *Davis*, 394 U.S. at 726. The Court rejected this rationalization:

> It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth

> Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'

Davis, 394 U.S. at 726-27. If the police cannot detain individuals without individualized suspicion for the purpose of fingerprinting, which the Court in *Davis* noted constituted a "less serious intrusion upon personal security," they surely cannot *arrest* without individual suspicion in order to facilitate further investigation. *Davis*, 394 U.S. at 727 (emphasis added).

This very argument was rejected by the Court in *Mallory v. United States*, 354 U.S. 449 (1957), where the question confronting the Court concerned the applicability of Federal Rule of Criminal Procedure 5(a) requiring that arraignment be held "without unnecessary delay." Mallory had been arrested along with two of his nephews as suspects in a rape. He was held for an extended period of time, during which police extracted a confession, before being taken for arraignment. One of the arguments pressed by the Government was that effective law enforcement should not be hampered. This is similar to the argument presented by Petitioner and Amici. Br. Pet. 24-29; Br. U.S. 23-30; Br. CJLF 19-22. Rejecting that argument in *Mallory*, this Court stated:

> Nor is there an escape from the constraint laid upon the police by that Rule in that two other suspects were involved for the same crime. *Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of*

> *the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'*

Mallory, 354 U.S. at 456 (emphasis added). The tactic that the Court rejected in *Mallory* was exactly the tactic employed by Officer Snyder in the instant case.[14]

Police simply may not arrest first and sort out the probable cause later.[15]

Amicus, CJLF further asserts that "[g]iven the importance of interrogations and confessions to solving crimes, . . . the ability to arrest suspects is essential to the continuing investigation of a crime." Br. CJLF 19. The same sort of claim was made and turned aside in *Di Re* where the Court held:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will

[14] Officer Snyder testified that he questioned each of the occupants of the car in an attempt to discover who owned the drugs and that he essentially threatened all of the occupants with arrest "if he didn't find out whose drugs" they were. (JA 52).

[15] In the Fourth Amendment context, the Court has been mindful of the potential for abuse when interpreting the authority of the police to act. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968). Recently, in Prince George's County, Maryland, the police were taken to task for unnecessarily delaying presentment of defendants before a Commissioner after arrest in order to obtain written statements. In two cases, the Court of Appeals of Maryland reversed the convictions because of this abuse. *See Facon v. State of Maryland*, 2003 WL 21361541 (2002) (delayed presentment for 36 hours after arrest); *Williams v. State of Maryland*, 2003 WL 26361726 (2002) (delayed presentment for 47 hours after arrest).

> be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

Di Re, 332 U.S. at 595. That the job of the police in investigating a crime would be made easier by permitting sweeping arrests is not a sufficient justification for dispensing with the inviolate requirement of individualized suspicion.

Petitioner gives short shrift to the effect of permitting sweeping arrests noting that "[b]y arresting all three, the officer more precisely could determine criminal culpability," and remarking, as if this were a fairy tale with a happy ending, that "Pringle confessed, and the other two were set free." Br. Pet. 25. This position ignores the very real possibility that a defendant in Respondent's position would not confess, but would, in fact, invoke his right to remain silent. Further, Petitioner gives no consideration to the real potential that those subject to these suspicionless arrests may be unable to post bail. According to statistics from the Baltimore County Detention Center where the three would have been incarcerated, the average number of days spent in pre-trial detention on a felony charge is 77 days. (Baltimore County Sentenced Inmate Elapsed Report, July 1, 2003, source, Baltimore County Detention Center). The risk that innocent people will spend significant periods of time incarcerated will be greatly enhanced should the police be permitted to arrest all occupants of a car containing hidden contraband regardless of a lack of particularized suspicion.

The approach endorsed by Petitioner and Amici, that is, arresting all occupants even absent a particularized suspicion, Br. Pet. 25 and Br. U.S. 26, relies on the observation in *Brinegar* that "room must be allowed for some mistakes." *Brinegar*, 338 U.S. at 176. But the approach of Petitioner and Amici goes too far. Petitioner and Amici argue that Officer Snyder was justified in arresting all three occupants even if there existed a strong likelihood that innocent persons would be arrested. Br. Pet. 25; Br. U.S. 25; Br. CJLF 13-14. But the reference in *Brinegar* to the possibility of mistakes made by reasonable officers should not be read as to weaken the level of particularized suspicion necessary to constitute probable cause. The primary question at issue in *Brinegar* was whether evidence inadmissible in a criminal trial (hearsay) could form the basis for a finding of probable cause in a pretrial suppression hearing. The Court's language in *Brinegar* that recognizes and allows for some mistakes should be understood as an acknowledgment of the possibility of error in the probable cause determination only in the sense that the fair probability standard for probable cause would ensnare more innocent people than the beyond-a-reasonable-doubt standard required in the criminal trial because it is a less demanding standard. That is a far cry from endorsing a police practice that foreseeably *increases* the number of mistakes.

Moreover, the Court limited the room-for-mistakes allowance to mistakes of "reasonable men, acting on facts leading sensibly to their conclusions of *probability*." *Brinegar,* 338 U.S. at 176 (emphasis added). In other words, by referring to room for mistakes, this Court's opinion in *Brinegar* should not be read to suggest that police may arrest even those for whom there is no

individualized suspicion because mistakes will be made which can be sorted out during subsequent investigation. Rather, the reference to "mistakes" means simply that, in calculating the *probability* that a particular person has committed a crime, the police will fall short of certainty.

Rather than limit the number of reasonable mistakes that may be made, Petitioner and Amici *encourage* mistakes by insisting that everyone, regardless of the lack of individualized suspicion, should be arrested. Respondent's approach, on the other hand, discussed in the following section, would allow the police to arrest the driver/owner of the automobile as well as any passengers for whom a reasonable individualized suspicion may be inferred from the totality of the circumstances where contraband is found concealed inside the car.

II. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THERE WAS NO PROBABLE CAUSE TO ARREST RESPONDENT.

Before undertaking an analysis of the totality of the circumstances in this case, it is important to point out a factual error made repeatedly by both Petitioner and Amici in addressing the circumstances confronting Officer Snyder at the time that he arrested all of the occupants of the car. Continual reference is made in the briefs to the fact that Officer Snyder found a "roll of cash," Br. Pet. 9; Br. U.S. 1, 7, 8, 9, 13, 16; a "large quantity of cash (perhaps proceeds of drug sales)," Br. Pet. 22, 23; a "substantial amount of cash," Br. U.S. 2; "a roll of money totaling $763," Br. U.S. 2; a "bundle of cash," Br. U.S. 9; a "large roll of cash," Br. CJLF 2; and "over $700," Br. CJLF 5. However, a careful reading of the record of the suppression hearing reveals that Officer Snyder's only reference to

what was discovered in the glove compartment was described as "the money." (JA 12). Neither the amount nor any adjective to describe the amount was ever testified to by anyone at the suppression hearing. Nor was any documentary evidence introduced at the suppression hearing quantifying or describing the amount of money.[16] Thus, all references made by Petitioner and Amici describing the money reflect nothing more than reliance on facts not before the suppression hearing judge.[17]

Distilled to its essence, the arrest of Respondent was based on nothing more than his presence in a car in which hidden drugs were discovered. But this Court has held in both *Di Re* and *Ybarra* that mere presence is insufficient to constitute probable cause to arrest or search. Officer Snyder failed to articulate any fact that would support a conclusion that Respondent, as the front seat passenger, possessed the drugs hidden in the rear seat. He made no furtive movements, he made no gestures and, at the scene of the arrest, he said nothing of a suspicious nature; he simply remained silent.

Given this dearth of information tying Respondent to the contraband, Petitioner places significant reliance on the inference that "the occupants are acquainted." Br. Pet. 8. Even if the record supports an inference that the occupants were friends, this alone would not amount to probable cause to arrest Respondent. *See Sibron*, 392 U.S. at

[16] The actual amount was revealed during the trial on the merits.

[17] In Maryland, appellate review of the denial of a motion to suppress is limited to information contained in the record of the suppression hearing and not the record of the trial. *Collins v. State*, 367 Md. 700, 706, 790 A.2d 660 (2002).

40. For purposes of determining who should be arrested under the circumstances of this case, the relationship of the occupants as acquaintances, while a factor to be considered, is not determinative. What is decisive is the distinction that this Court has drawn between drivers and passengers.

In *Rakas v. Illinois*, 439 U.S. 128 (1978), the defendants were passengers in an automobile stopped by the police who had reason to believe the automobile was the getaway car involved in an earlier robbery. The occupants were ordered out of the car, and a search revealed a box of rifle shells in the glove compartment and a rifle under the front passenger seat. The police arrested all of the occupants. Rejecting the argument that the defendants had automatic standing to challenge the search and seizure, this Court concluded that passengers in a vehicle who asserted a possessory interest in neither the vehicle nor the items seized did not have a reasonable expectation of privacy therein. Specifically, the Court held:

> But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.

Rakas, 439 U.S. at 148-49. Thus, to the extent that one has a reasonable expectation of privacy in a car, it is reasonable for the police to presume he is aware of and can control what is inside the car. If a passenger does not have

a reasonable expectation of privacy in a particular compartment, *i.e.*, in a glove compartment or an upright armrest within the car, then it is not reasonable for police to presume that the passenger has awareness of and control over what is inside those areas absent any facts indicating to the contrary. The *Rakas* decision is consistent with the notion that, without more information, as in the case at bar, police may presume that a driver/owner, but not a passenger, is aware of items hidden within a car. *Cf. Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (recognizing the distinction between drivers and passengers by noting that "[o]n the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver.").[18] That Officer Snyder recognized the superior right of drivers to control the contents of their cars is demonstrated by the fact that it was the driver, Parlo, from whom he sought permission to search the car. Officer Snyder did not ask either passenger for such permission.

In conclusion, there must exist a particularized basis for suspecting that a passenger in a car where contraband is hidden knowingly possesses the contraband in order to arrest the passenger. His mere status as a passenger is not enough. The inferences that Petitioner suggests should be drawn from Respondent's presence in the car are not

[18] Further, the reference in *Houghton,* 526 U.S. at 303, to the reduced expectation of privacy that passengers "no less than drivers" possess must be read in the context of the facts of that case which, as stated earlier, concerned the search of a passenger's purse and not the seizure of the passenger herself. With respect to the more intrusive seizure of the person, even *Houghton* recognized the need for significantly heightened protection.

reasonable and cannot support a conclusion that there was probable cause to arrest Respondent.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the judgment of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

STEPHEN E. HARRIS
Public Defender

NANCY S. FORSTER
Deputy Public Defender

SHERRIE GLASSER*
Assistant Public Defender

Counsel for Respondent

**Counsel of Record*