No. 19A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

TONY DESHAWN MCCOY,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

Ann L. Hester
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
129 West Trade Street
Suite 300
Charlotte, North Carolina 28202
(704) 374-0720
Ann_Hester@fd.org

Pamela S. Karlan
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, California 94305
(650) 725-4851
karlan@stanford.edu

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Chief Justice John G. Roberts, Jr., Circuit Justice for the Fourth Circuit:

Under this Court's Rules 13.5 and 22, Applicant Tony Deshawn McCoy requests an extension of thirty days to file his petition for a writ of certiorari. That petition will challenge the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. McCoy*, 773 Fed. Appx. 164 (4th Cir. 2019), a copy of which is attached. In support of this application, Applicant states:

1. The United States Court of Appeals issued its decision on July 12, 2019. App. 1a. That court denied a timely filed petition for rehearing en banc on August 26, 2019. App. 4a. Without an extension, the petition for a writ of certiorari would be due on November 25, 2019. With the requested extension, the petition would be due on December 26, 2019. This Court's jurisdiction will be based on 28 U.S.C. § 1254(1).

2. This case is a serious candidate for review. It raises the question whether, whenever an officer has reason to believe that a person he has lawfully stopped possesses illegal drugs, the officer can conduct a full-scale search of the individual because the "indisputable nexus between drugs and guns presumptively creates a reasonable suspicion" that the stopped

individual is armed and dangerous, App. 2a (quoting *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998)).

In this case, Applicant was stopped for driving an apparently improperly registered vehicle with a cracked windshield and for a seat-belt violation. App. 5a.[1] Applicant was entirely cooperative during the stop. As one of the officers later acknowledged, he "did everything that we tell young people to do when they're stopped by the police." C.A. Jt. App. 54.

Officers had noticed an odor of marijuana during the traffic stop. App. 6a. Upon being questioned, Applicant disclosed that he had a "little bit" of marijuana in his pocket. C.A. Jt. App. 36. At that point, police handcuffed him, *id.* 56-57, and an officer searched his pocket, where the officer discovered the marijuana, App. 6a. The officers did not, however, formally arrest him. C.A. Jt. App. 57. The officer then continued his search, ultimately discovering a gun in Applicant's waistband. *Id.* 36; App. 6a.

3. Applicant was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). App. 7a. He moved to suppress the gun, contending that the officer's search for a weapon violated the Fourth Amendment because the officer lacked reasonable suspicion to believe that Applicant was "armed and dangerous," as *Terry v. Ohio*, 392 U.S. 1, 27 (1968), requires. The district court denied that motion, relying on

[1] In fact, the vehicle was properly registered, as the officers subsequently determined. *See* C.A. Jt. App. 42-46.

longstanding Fourth Circuit precedent that officers are entitled to presume from the presence of illegal drugs that a subject is armed. App. 11a. Applicant then entered a conditional guilty plea, preserving his right to appeal the district court's denial of his suppression motion.

On appeal, the Fourth Circuit affirmed. App. 2a. It reiterated the longstanding position of the circuit, articulated in *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998). There, the court declared that because "a person carrying controlled substances is likely armed" there is a presumption that such a person is dangerous to officers and can be subjected to a *Terry* search. App. 3a. The panel acknowledged that "some courts ha[d] rejected *Sakyi*," but considered itself bound by circuit precedent. *Id.* The full court ultimately denied a petition for rehearing en banc. *Id.* 4a.

4. The Fourth Circuit's reaffirmance of the presumption it adopted in *Sakyi* further entrenches a conflict over whether, or when, the presence of illegal drugs can create a reasonable suspicion that an individual is armed and dangerous, and therefore can be searched consistent with the Fourth Amendment.

Numerous state courts of last resort have taken the position that the simple presence of illegal drugs creates no presumption of dangerousness, with several of those decisions expressly rejecting the Fourth Circuit's decision in *Sakyi*. *See, e.g.*, *Somee v. State*, 187 P.3d 152, 158 (Nev. 2008) ("We do not adopt the apparent per se rule linking drugs and guns used in

the Fourth Circuit . . . ."); *Commonwealth v. Grahame*, 7 A.3d 810, 811 (Pa. 2010) (rejecting a "'guns follow drugs' presumption"); *Furr v. State*, 499 S.W.3d 872, 880-81 (Tex. Crim. App. 2016) (refusing to adopt a rule "that it is per se objectively reasonable for the police to pat down a suspect for weapons if they are accused of possessing drugs"); *State v. Baker*, 229 P.3d 650, 666-67 (Utah 2010) (absent specific reason to believe an individual is armed and dangerous, officers' "suspicion of drug possession cannot support a reasonable belief that the individual posed a threat"); *Upshur v. United States*, 716 A.2d 981, 984 (D.C. 1998) (the connection between drugs and guns "standing alone is insufficient to warrant a police officer's reasonable belief that a suspect is armed and dangerous"). Of particular salience, the highest court in Maryland, a state within the Fourth Circuit, has expressly rejected *Sakyi*'s reasoning: "[W]e simply do not adopt the view that the odor of marijuana alone emanating from a vehicle gives rise to the inference that a passenger in the vehicle is potentially armed and dangerous." *Norman v. State*, 156 A.3d 940, 967, 970 (Md.), *cert. denied*, 138 S. Ct. 174 (2017).

Nor has any other federal court of appeals adopted *Sakyi*'s broad rule that suspicion of simple possession of marijuana justifies a presumption that a suspect is armed and dangerous. Instead, to the extent that other circuits permit an inference of dangerousness to be drawn from the presence of illegal drugs, they have required a reasonable suspicion to believe that the suspect is involved in drug *distribution*. *See, e.g.*, *United States v. Davis*, 726 F.3d

434, 440 (3d Cir. 2013) (stating that "officers had a reasonable belief" that the suspects were armed and dangerous "[b]ecause drug dealers often carry guns" (quotation marks omitted)); *United States v. Rivera*, 101 Fed. Appx. 166, 171 (7th Cir. 2004) (referring to a suspect "engaged in a drug transaction" and declaring "drug traffickers" can be presumed to be armed and dangerous) (quoting *United States v. Serna-Barreto*, 842 F.2d 965, 967 (7th Cir.1988))); *United States v. Robinson*, 119 F.3d 663, 667 (8th Cir. 1997) (referring to individuals "suspected of being involved in a drug transaction"); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1086-87 (9th Cir. 2000) (referring to individual reasonably suspected of "dealing in narcotics"); *United States v. Hishaw*, 235 F.3d 565, 570 (10th Cir. 2000) (referring to reasonable suspicion that the defendant "was distributing drugs"—in fact, crack cocaine).

5. The question presented has taken on increasing importance in recent years. While possession of marijuana remains a crime under federal law, a majority of states now permit at least some individuals to possess marijuana, and a growing number of states have decriminalized simple possession altogether. That legalization undermines the assumption, if indeed it ever was valid, that marijuana possession is strongly enough connected to weapons possession to presume people who possess marijuana are armed and dangerous. Permitting the police to conduct intrusive searches of individuals, without any articulable basis for believing that an individual

poses a threat beyond a suspicion that he possesses marijuana for personal use, unjustifiably threatens those individuals' privacy.

6. This application for a thirty-day extension seeks to accommodate Applicant's legitimate needs. Applicant has only recently affiliated undersigned counsel at the Stanford Supreme Court Litigation Clinic. The extension is needed for undersigned counsel and other members of the Clinic to fully familiarize themselves with the record, the decisions below, and the relevant case law. In light of the Clinic's many other obligations, the Clinic would not be able adequately to complete these tasks by the current due date.

For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be extended to December 26, 2019.

Dated: November 6, 2019

Respectfully submitted,

By: 

Ann L. Hester
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
129 West Trade Street
Suite 300
Charlotte, North Carolina 28202
(704) 374-0720
Ann_Hester@fd.org

Pamela S. Karlan
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, California 94305
(650) 725-4851
karlan@stanford.edu

Counsel for Applicant