No. 19-___

IN THE

Supreme Court of the United States

TONY DESHAWN MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Terry v. Ohio*, 392 U.S. 1 (1968), the Fourth Amendment permits officers to search a person they have lawfully stopped only if they have specific and articulable reason to believe that person is "armed and presently dangerous." *Id.* at 30. The question presented is:

Whether officers can presume that a person is "armed and presently dangerous" simply because the person possesses any amount of marijuana, however small.

RELATED PROCEEDINGS

United States v. McCoy, No. 3:17-cr-00240-MOC-DSC (W.D.N.C. Mar. 2, 2018)

United States v. McCoy, No. 18-4731 (4th Cir. July 12, 2019), *reh'g denied* (Aug. 26, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Deshawn McCoy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished panel opinion of the court of appeals (Pet. App. 1a-5a) is reported at 773 Fed. Appx. 164. The order denying rehearing en banc (Pet. App. 19a) is unreported. The order of the district court (Pet. App. 6a-18a) is unreported but available at 2018 WL 1144591.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on July 12, 2019. Pet. App. 1a. The Fourth Circuit denied a timely petition for rehearing en banc on August 26, 2019. *Id.* 19a. On November 12, 2019, the Chief Justice extended the time to file this petition for a writ of certiorari to and including December 26, 2019. *See* No. 19A514. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT OF THE CASE

The Fourth Amendment generally prohibits police from searching an individual absent a warrant or probable cause. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court established a "narrowly drawn" exception to this prohibition. *Id.* at 27. As is relevant here, *Terry* permits officers who have made a lawful stop to search an individual, but only when they have "specific and articulable facts" that suggest that the individual is "armed and presently dangerous to the officer[s] or to others." *Id.* at 21, 24, 29-30.

In this case, the Fourth Circuit held that petitioner's simple possession of marijuana created a reasonable suspicion that he was "armed and therefore dangerous," Pet. App. 3a-4a (citation omitted), regardless of the other specific and articulable circumstances surrounding the encounter. In reaching this holding, the Fourth Circuit relied on its unique rule—which has been rejected by seven other courts—that possession of any amount of marijuana automatically gives rise to a presumption that a person is likely armed and dangerous.

A. Factual background

One afternoon in November 2016, petitioner Tony Deshawn McCoy, accompanied by a female friend, was driving near his father's house when a Charlotte-Mecklenburg Police Department patrol car pulled him over. Vid. 00:30-00:45.[1] Mr. McCoy was driving with a

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[1] One officer's body camera recorded the entire encounter. That video, Government Exhibit Number 1 at the suppression hearing in the district court, is included in the record below. C.A.

cracked windshield, and the officers believed he was not wearing a seatbelt. Pet. App. 7a.[2]

As the officers, Caleb Skipper and Brandon Sinnott, later acknowledged, Mr. McCoy was very cooperative throughout the stop, Pet. App. 16a; he "did everything that we tell young people to do when they're stopped by the police," C.A. J.A. 54.

Mr. McCoy made no furtive movements and remained seated, "very still," with both "hands on the steering wheel the whole time" as Officer Skipper approached the driver's side door. C.A. J.A. 53-54. (Officer Sinnott approached the passenger's side of the vehicle and remained there throughout the stop. *Id.* 61-62.) Mr. McCoy lifted one hand and motioned for Officer Skipper to open the door. Pet. App. 7a; Vid. 01:00-01:08. When Officer Skipper asked for his license and registration, Mr. McCoy provided his documents, Pet. App. 7a, asking for permission to reach for his documents and telling the officer that he was going to reach toward his pocket for his wallet before doing so. Vid. 01:05-01:40.

After Officer Skipper told Mr. McCoy why he had pulled him over, the two had a short conversation, touching on such topics as the Cubs' World Series victory two days prior. Vid. 01:47-02:25; *see also* Pet. App. 7a. Mr. McCoy and his friend remained in the vehicle while Officer Skipper returned to his patrol car

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J.A. 32-33, 94. Throughout this petition, citations to "Vid." refer to a timestamp in this recording.

[2] The officers originally thought that there was also a problem with the vehicle's license plate. Pet. App. 7a. That turned out to be mistaken. *Id.* 13a. Regardless, petitioner does not challenge before this Court the lawfulness of the traffic stop.

to run a warrant check. C.A. J.A. 35, 62; Vid. 02:50-05:20. The check revealed that Mr. McCoy's driver's license was valid and that he had no outstanding warrants, although he did have some kind of "felony criminal history." C.A. J.A. 35, 45.

When Officer Skipper returned, he asked Mr. McCoy to get out of the car, ostensibly to look at an issue with the license plate. Vid. 05:29-05:35. Mr. McCoy placed his soft drink on the dash and narrated his actions to Officer Skipper as he exited, prompting the officer to comment, "I appreciate y'all being cooperative" and "I do like how you're saying everything you're doing." Vid. 05:34-05:52. The two officers allowed the passenger to remain inside the vehicle.

After getting out of the car, Mr. McCoy admitted that he had some marijuana in his left front pocket. C.A. J.A. 36; Vid. 05:55-06:05. Officer Skipper told Mr. McCoy he had smelled marijuana earlier, and calmly noted that "most people" have marijuana nowadays. Vid. 05:55-06:05. The officer told Mr. McCoy, "I'm gonna put cuffs on you," but stated that he was "not under arrest; I usually write [only a citation] for marijuana." Vid. 06:05-06:18; *see also* C.A. J.A. 36.

Officer Skipper then conducted a thorough search of Mr. McCoy. Vid. 06:30-07:25. He removed a small plastic bag from Mr. McCoy's pocket. The bag contained less than half an ounce of marijuana. C.A. J.A. 92. Under North Carolina law, possession of that amount constitutes a misdemeanor with no jail time and a maximum fine of $200. *See* N.C. Gen. Stat. §§ 90-94(1), 90-95(d)(4), 15A-1340.23(b).

Officer Skipper then kept Mr. McCoy in handcuffs and continued the search. Vid. 06:50-07:25; C.A. J.A. 36. Ultimately, Officer Skipper felt a hard object in Mr. McCoy's waistband. Vid. 07:16-07:30; C.A. J.A. 36. Mr. McCoy admitted that the object was a handgun. Vid. 07:25-07:31. Officer Skipper retrieved it and placed Mr. McCoy under arrest. Vid. 07:30-09:20; C.A. J.A. 36-37.[3]

B. Procedural history

1. The United States indicted Mr. McCoy for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 9a.

Mr. McCoy moved to suppress the firearm found during the search. C.A. J.A. 10-17. As relevant here, Mr. McCoy argued that the search violated the Fourth Amendment because Officer Skipper lacked any reasonable, articulable suspicion that Mr. McCoy was armed and dangerous. Pet. App. 9a.

The district court denied Mr. McCoy's motion. Pet. App. 6a-18a. It acknowledged that "a mere traffic infraction and knowledge that a person has a criminal record is not enough to give rise to a reasonable suspicion that a defendant is armed and dangerous." *Id.* 16a (citing *United States v. Powell*, 666 F.3d 180, 189 (4th Cir. 2011)). But the possession of marijuana decisively changed its calculus, because under Fourth Circuit precedent, "the presence of drugs permits a reasonable inference of the presence of firearms." *Id.*

Mr. McCoy entered a conditional guilty plea, reserving his right to appeal the denial of the motion

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[3] Although Mr. McCoy's companion also admitted to having a small amount of marijuana, she was not arrested. C.A. J.A. 63.

to suppress. C.A. J.A. 122-25. He was sentenced to thirty-seven months in prison and three years of supervised release. *Id.* 143-44.

2. A panel of the Fourth Circuit affirmed. Pet. App. 1a-5a. In reaching its decision, the panel relied on *United States v. Sakyi*, 160 F.3d 164 (4th Cir. 1998). Pet. App. 3a-5a. In that case, officers saw indicia of a material amount of marijuana in a car they had lawfully stopped. The question was whether, having already arrested the driver, they could conduct a *Terry* frisk of the passenger before searching the vehicle. The court held that they could. It recognized that under this Court's decisions, it could "not rely on a generalized risk to officer safety to justify a routine 'pat-down' of all passengers as a matter of course." *Sakyi*, 160 F.3d at 169. But it held that an "indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer." *Id.* That nexus is sufficient to justify a search whenever an officer "has a reasonable suspicion that illegal drugs are in the vehicle," absent "factors allaying his safety concerns." *Id.*

The panel in Mr. McCoy's case upheld the search based on the presumption recognized in *Sakyi*. *See* Pet. App. 3a. And while Mr. McCoy had pointed to a number of facts to demonstrate that he was not dangerous, *see id.*, the court dismissed that evidence, concluding that nothing "negate[d] the core logic behind *Sakyi*—that a person carrying controlled substances is likely armed," *id.* 4a.

The Fourth Circuit denied Mr. McCoy's petition for rehearing en banc. Pet. App. 19a.

REASONS FOR GRANTING THE WRIT

There is a conflict among the lower courts over whether simple possession of marijuana creates a presumption that a person is armed and dangerous. The answer to that question is especially important because a growing number of states have legalized marijuana for medicinal or recreational use. Under these circumstances, police will encounter tens of millions of Americans who possess marijuana for personal use. Nothing in this Court's decisions provides a basis for the Fourth Circuit's presumption that all these people are armed and dangerous and can therefore be subjected to intrusive police searches.

I. There is sharp division over whether mere possession of marijuana creates a reasonable suspicion that an individual is armed and dangerous.

The Fourth Circuit alone permits an officer to infer that a person is armed and dangerous whenever that person possesses any amount of marijuana, however small. Six courts of last resort and a federal court of appeals reject this position.

1. Within the Fourth Circuit, officers are entitled to presume that "a person carrying controlled substances"—including marijuana—"is likely armed" and therefore, without the discovery of any additional facts, can be searched for weapons during a lawful stop. Pet. App. 4a (citing *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998)); *see United States v. Coe*, 490 Fed. Appx. 544, 546 (4th Cir. 2012) (observing that suspicion of drugs in a vehicle, alone, "allowed the officers to remove the occupants and conduct a pat-down of each for weapons").

This presumption is extremely strong. *Sakyi* suggested that "ameliorating factors" might overcome it. 160 F.3d at 169.[4] But petitioner has been unable to find a single Fourth Circuit decision in the two decades since where the defendant has successfully rebutted the presumption. Meanwhile, the Fourth Circuit has routinely upheld searches based solely on the suspicion that drugs are present, without regard to the existence of facts that undermine any inference of dangerousness. For example, in *United States v. Rooks*, 596 F.3d 204 (4th Cir. 2010), the defendant argued that his "polite, calm and compliant demeanor during the traffic stop" allayed any indication that he was dangerous. Def.'s Br. 19, *Rooks*, 596 F.3d 204 (No. 08-4725). Without addressing that evidence at all, the Fourth Circuit flatly declared that once an officer "detected marijuana" in the vehicle, he was authorized to search the defendant. *Rooks*, 596 F.3d at 210. And in Mr. McCoy's case, the court again dismissed the ameliorating factors out of hand. Pet. App. 3a-4a. Thus, the Government is right: A "single factor"—the presence of marijuana—appears inexorably to "satisf[y] the showing required to support" a search in the Fourth Circuit. U.S. C.A. Br. 13 (citation omitted).

2. Six courts of last resort and the D.C. Circuit have declined to adopt the presumption that possession of marijuana, standing alone, justifies an officer's conclusion that a person is armed and dangerous. To the extent that marijuana possession is

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[4] In *Sakyi*, far from there being "ameliorating factors" to "allay" the officer's safety concerns, the surrounding circumstances "heightened them." 160 F.3d at 169.

relevant, these courts view it only as a factor in an assessment of the totality of the circumstances.

The highest court of the District of Columbia has refused to "impute a safety concern from the mere fact that" officers believe a person to possess (or be purchasing) drugs. *Upshur v. United States*, 716 A.2d 981, 984 (D.C. 1998). While acknowledging that there may be some "connection" between drugs and weapons, the *Upshur* court observed that this factor "standing alone is insufficient to warrant a police officer's reasonable belief that a suspect is armed and dangerous." *Id.*

Maryland's highest court has expressly "decline[d] to follow the Fourth Circuit's lead" with respect to the purported connection between marijuana and guns. *Norman v. State*, 156 A.3d 940, 966 (Md.), *cert. denied*, 138 S. Ct. 174 (2017). In the Maryland court's view, the "odor of marijuana" does not "give rise to reasonable articulable suspicion" that a vehicle's occupants are "armed and dangerous and subject to frisk." *Id.* at 944. To the contrary, that fact alone provides "no basis" for a *Terry* search. *Id.* at 967.

The Supreme Court of Nevada has likewise declined to "adopt the apparent per se rule linking drugs and guns used in the Fourth Circuit." *Somee v. State*, 187 P.3d 152, 158 (Nev. 2008). Instead, Nevada has adopted the "approach that reasonable articulable suspicion of narcotics activity" is but "a factor which, in light of the totality of the circumstances, *may* give rise to a reasonable articulable suspicion that a suspect poses a danger to the officer." *Id.* (emphasis added).

So too, the Pennsylvania Supreme Court has declined to "employ a 'guns follow drugs' presumption to uphold protective searches conducted during drug investigations." *Commonwealth v. Grahame*, 7 A.3d 810, 813 (Pa. 2010). Emphasizing that courts cannot "rely exclusively upon the preconceived notion that certain types of criminals regularly carry weapons," the court indicated that reasonable suspicion cannot be based on a "generalization." *Id.* at 816-17. Instead, "reasonable suspicion is evaluated under the totality of the circumstances." *Id.* at 813.

Texas's court of last resort for criminal appeals explicitly declined that state's request to adopt a "per se" presumption that individuals "accused of possessing" drugs are armed and dangerous and thus subject to search. *Furr v. State*, 499 S.W.3d 872, 880-81 (Tex. Crim. App. 2016). Although in *Furr* the court held that the search of the defendant was justified given the totality of the circumstances (including a tip, the subject's furtive movements and nervous behavior, and presence in a "high drug, high crime" area), it made clear that "mere drug use" does not suffice. *Id.*

Finally, in Utah, "[u]nless officers can point to a specific reason why suspected possession of narcotics by an individual led them to believe the individual to be armed and dangerous, their suspicion of drug possession cannot" justify a search of that person. *State v. Baker*, 229 P.3d 650, 666 (Utah 2010). The Utah Supreme Court observed that "possession of a small amount of drugs" was not "a type of crime for which the offender would likely be armed." *Id.* (citation omitted).

The D.C. Circuit has taken a similar approach. In *United States v. Price*, 409 F.3d 436 (D.C. Cir. 2005),

officers received a reliable tip that the driver of an automobile had a quarter pound of marijuana in his car. Ultimately, the officers stopped the car and searched a passenger, Mr. Price, finding a handgun. The Government argued, citing *Sakyi*, that the tip regarding the presence of drugs was by itself enough to justify a *Terry* search. U.S. C.A. Br. 20-25, *Price*, 409 F.3d 436 (No. 03-3088). The D.C. Circuit disagreed. It upheld the *Terry* search only after finding an additional factor beyond the reasonable suspicion that marijuana was present: Price disobeyed the officers' commands to keep his hands in plain view and "instead reach[ed] back toward his waistband in a motion that [was] consistent with an attempt to retrieve a weapon." *Price*, 409 F.3d at 442. The court was unwilling to "suggest that a *Terry* frisk would have been justified absent the totality of these circumstances." *Id.*

By contrast, in this case, Mr. McCoy kept his hands in plain view at all times and narrated his actions; the Government pointed to nothing that suggested any attempt to retrieve a weapon. Under the D.C. Circuit's analysis, as well as the rules of the six courts of last resort, the officers violated the Fourth Amendment in searching Mr. McCoy.

3. To be sure, some courts have found it "foreseeable" that drug traffickers with "significant amounts of illegal drugs" on their person may be "carrying guns as well." *See Florida v. J.L.*, 529 U.S. 266, 273 (2000) (citing cases that have adopted this view). Thus, a number of federal courts of appeals have

upheld *Terry* searches of individuals who are believed to be engaged in drug distribution.[5]

But decisions involving suspected drug *traffickers* should not be read to answer the question whether simple possession of a small amount of marijuana makes it likely that a person is armed and dangerous. (And reading those cases to answer the question presented would only deepen the conflict among the lower courts.) The Texas Court of Criminal Appeals drew exactly this distinction: "While it is true that we have held 'it is objectively reasonable for a police officer to believe that persons involved in the drug business are armed and dangerous,' we made that comment in the context of *sellers of narcotics, not mere drug use*." *Furr*, 499 S.W.3d at 880-81 (quoting *Griffin v. State*, 215 S.W.3d 403, 409 (Tex. Crim. App. 2006)) (emphasis added).

4. The conflict between the Fourth Circuit and the other courts that have addressed the issue is

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[5] *See, e.g.*, *United States v. Anderson*, 859 F.2d 1171, 1177 (3d Cir. 1988) ("large amount of cash" was believed to be "drug money"); *United States v. Reyes*, 349 F.3d 219, 224-25 (5th Cir. 2003) (narcotics dog alerted to the defendant at a bus stop "two blocks away from the border with Mexico" in a town with "a reputation as a gateway for drug smuggling"); *United States v. Branch*, 537 F.3d 582, 585, 589 (6th Cir. 2008) (dog signaled to narcotics "at several places on [a] car," and officers found a canvas bag containing "nearly $10,000 in cash"); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1085-86 (9th Cir. 2000) (individual suspected of "dealing in narcotics" arrived at "a vacant hotel room that had been used for drug trafficking the past five days"); *United States v. Hishaw*, 235 F.3d 565, 570 (10th Cir. 2000) (suspect's "coming and going from the apartment named in [a] search warrant and the hand-to-hand contact observed outside the apartment" indicated he was "distributing drugs").

intractable. In Mr. McCoy's case, the Fourth Circuit refused to address the question en banc despite the clear conflict. And given the large number of courts on the other side of the split, there is no reasonable prospect that the conflict will disappear.

II. The question presented is important.

1. *Terry* searches are intrusive and inflict real harms on those who are subjected to them. As this Court has recognized, searches of a person's body can be "humiliating." *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). A pat-down search "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id.* at 17.

At the same time, tens of millions of Americans use marijuana, many of them permitted to do so by state law.[6] These individuals need to know whether every traffic stop or other encounter with police carries the risk of having officers "feel with sensitive fingers every portion of [their] bod[ies]," including their "arms and armpits, waistline and back, [and] groin," *Terry*, 392 U.S. at 17 n. 13 (citation omitted).

2. The question whether simple possession of marijuana is sufficient to authorize an intrusive *Terry* search is especially important given the current legal landscape.

Eleven states and the District of Columbia have legalized marijuana for recreational use.[7] Thirty-three

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[6] *See Weed & the American Family*, MaristPoll (Apr. 17, 2017), https://bit.ly/35ihKN2.

[7] *Marijuana Overview*, Nat'l Conf. St. Legislatures (Oct. 17, 2019), https://bit.ly/36owOte.

states—including Maryland and West Virginia within the Fourth Circuit—and the District of Columbia have legalized medical marijuana.[8] Still other states are actively considering whether to legalize marijuana for medical or recreational use, or both.[9]

Even in a number of states that have not legalized marijuana, the penalties for simple possession have been dramatically reduced.[10] Consider North Carolina, the state in which this case arose. There, a person who possesses less than half an ounce of marijuana (as did Mr. McCoy, C.A. J.A. 92) faces no jail time, and a maximum fine of just $200. N.C. Gen. Stat. §§ 90-94(1), 90-95(d)(4), 15A-1340.23(b). Tellingly, Officer Skipper—who, in his words, typically just "write[s citations] for marijuana" given that "most people" have some these days—had no intention of arresting Mr. McCoy for possession of marijuana. *See* Vid. 05:55-06:10.

These circumstances raise the question whether police can continue to presume that possession of a small amount of marijuana is so strongly associated with other, more serious criminal activity that it creates reasonable suspicion that a person is armed

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[8] *State Medical Marijuana Laws*, Nat'l Conf. St. Legislatures (Oct. 16, 2019), https://bit.ly/2rpxpfu.

[9] *See* Sean Williams, *After Illinois, These States Could Legalize Recreational Marijuana Next*, USA Today (June 14, 2019), https://bit.ly/2NZzOFX; Reid Wilson, *Record Number of States Considered Marijuana Legalization in 2019*, The Hill (July 22, 2019), https://bit.ly/345b7Oa.

[10] *See* German Lopez, *15 States Have Decriminalized—but Not Legalized—Marijuana*, Vox (July 10, 2019), https://bit.ly/38qH1r0.

and dangerous and justifies an otherwise unconstitutional search.

3. An individual's Fourth Amendment rights should not depend on the forum where he is prosecuted. But that is the current state of affairs within the Fourth Circuit.

Because of the direct conflict between the Fourth Circuit's rule and the holding in *Norman v. State*, 156 A.3d 940, 944, 966-67 (Md.), *cert. denied*, 138 S. Ct. 174 (2017), the outcome of a suppression motion for a category of *Terry* searches occurring in Maryland can depend on whether a defendant is prosecuted in state or federal court. State courts in Maryland will generally suppress evidence if the sole basis for believing the suspect was armed and dangerous is his possession of a small amount of marijuana; federal courts will not.

North Carolina, where the search at issue here occurred, requires a totality-of-the-circumstances analysis for reasonable suspicion determinations, even in drug-related situations. *State v. Butler*, 415 S.E.2d 719, 722-23 (N.C. 1992). Thus, a North Carolina court might well have suppressed the gun taken from Mr. McCoy had he been prosecuted in state court. The court in *Butler*, for example, cautioned against treating an officer's "experience that people involved in drug *traffic* are often armed" as "alone necessarily satisf[ying] Fourth Amendment requirements" for a *Terry* stop and ensuing search. *Id.* at 722 (emphasis added). Here, by contrast, the Fourth Circuit presumed that Mr. McCoy's mere *possession* of a small amount of marijuana necessarily satisfied the reasonable suspicion standard. *See* Pet. App. 4a (endorsing a "presumption of danger").

Law enforcement officials recognize that applying different Fourth Amendment frameworks in federal and state courts create problems for police officers in the field. *See* Pet. Cert. 11-12, *Norman*, 138 S. Ct. 174 (No. 16-1547) (explaining those problems). Moreover, divergent constitutional rules between federal and state courts in the same jurisdiction create an incentive for prosecutors to forum shop, strategically selecting the court system with the more favorable Fourth Amendment rule.[11] This Court should intervene to prevent this type of prosecutorial forum shopping. *Cf. Elkins v. United States*, 364 U.S. 206, 208, 221-22 (1960) (ending the "silver platter doctrine").

These concerns about consistency explain why this Court has repeatedly granted review to resolve conflicts on questions of Fourth Amendment law between a state's highest court and the federal circuit in which the state is located. *See, e.g.*, Pet. Cert. 11-12, *Kansas v. Glover*, No. 18-556 (argued Nov. 4, 2019); Pet. Cert. 20-21, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371); Pet. Cert. 14-15, *Heien v. North Carolina*, 574 U.S. 54 (2014) (No. 13-604). This is another such case, and only this Court can resolve the conflict.

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[11] *Cf. Project Safe Neighborhoods*, U.S. Dep't Just., https://www.justice.gov/psn (last visited Dec. 12, 2019) encouraging "[t]argeted enforcement efforts" to "ensure prosecution" in whichever system "provides the most certain and appropriate sanction").

III. This case presents an ideal vehicle for resolving the conflict.

1. This case is free from any complicating factors that could prevent the Court from reaching the question presented. Unlike many cases involving *Terry* searches, Mr. McCoy is challenging only the constitutionality of the search, not the initial traffic stop. And the question whether that search comported with the Fourth Amendment was briefed by both parties and passed upon by both the court of appeals and the district court. Def. C.A. Br. 12-24; U.S. C.A. Br. 10-19; Pet. App. 3a-5a; *id.* 13a-17a.

2. The answer to the question presented is dispositive of this case. The Fourth Circuit identified nothing about Mr. McCoy's encounter with the police, beyond the officers' suspicion that he possessed marijuana, that could justify a belief that he was armed and dangerous.

Mr. McCoy was stopped in broad daylight in his father's neighborhood for minor traffic infractions that in no way suggested he was dangerous. Pet. App. 7a; *cf. Scott v. Harris*, 550 U.S. 372, 379-80 (2007) (explaining why a motorist who sped away from officers and led them on a high-speed chase might be presumed dangerous). The officers learned early in their encounter that Mr. McCoy had a valid driver's license and was not the subject of any warrants, Pet. App. 8a—additional factors that should have "serve[d] to dispel" any "reasonable fear" that Mr. McCoy was dangerous, *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Mr. McCoy's behavior during the encounter further dispelled any suggestion of danger. The arresting officers acknowledged that he was

cooperative. Pet. App. 16a. Officer Skipper agreed that Mr. McCoy "did everything that we tell young people to do when they're stopped by the police": He kept his hands visible, avoided sudden movements, and narrated his actions. C.A. J.A. 53-54.

Indeed, the officers' own actions during the stop belie any argument that there was any individualized basis to justify searching Mr. McCoy. For example, the officers left Mr. McCoy and his companion unrestrained in the car throughout the warrant and registration check. As for the relevance of the suspicion of marijuana, Officer Skipper stated during the encounter that "[marijuana is] kinda like underage drinking . . . . It doesn't mean you're going to jail . . . . Sometimes it doesn't mean you get a citation either. Sometimes it could just be 'have a good day.'" Vid. 16:30-16:45.

In short, absent reliance on the "the core logic behind *Sakyi*—that a person carrying controlled substances is likely armed," Pet. App. 4a—Officer Skipper lacked reasonable suspicion, and his search of Mr. McCoy violated the Fourth Amendment.

3. Finally, Mr. McCoy's conviction turns entirely on the legality of the search at issue here. Absent that search, there was no evidence whatsoever that Mr. McCoy possessed a firearm—a necessary element for his conviction under 18 U.S.C. § 922(g)(1).

IV. The Fourth Circuit's decision is wrong.

In this case, the Fourth Circuit held that Mr. McCoy's possession of a small amount of marijuana on his person created a reasonable suspicion that he was armed and dangerous. That holding is incorrect. It ignores this Court's approach to questions of

reasonable suspicion under the Fourth Amendment. And it also ignores contemporary reality and creates a danger of arbitrary and unfair policing.

1. This Court's reasonable suspicion jurisprudence disfavors per se rules like the Fourth Circuit's presumption that anyone who possesses even a small amount of marijuana is likely armed and dangerous.

Under *Terry v. Ohio*, 392 U.S. 1 (1968), police officers can search individuals without a warrant or probable cause only if they "reasonably" suspect that those individuals are "armed and presently dangerous." *Id.* at 30. "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271 (2000). Moreover, this Court has "deliberately avoided reducing" reasonable suspicion to "'a neat set of legal rules.'" *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (quoting *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996)). A court that substitutes a per se rule for the totality-of-the-circumstances inquiry "impermissibly insulates" decisions to search "from judicial review," *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997). While there may be situations where an especially salient fact is enough to support an inference that a suspect is armed and dangerous, courts reviewing a search must always ask whether additional facts known to the officer at the time undercut that inference.

In *Richards*, therefore, this Court unanimously rejected the idea of a "drugs exception" to general Fourth Amendment rules. That case asked whether officers executing a premises search warrant in a drug investigation are automatically relieved from the

Fourth Amendment's knock-and-announce requirement. The Wisconsin Supreme Court had held that they were, based on the assumption that all felony drug crimes involve "an extremely high risk of serious if not deadly injury to the police." *State v. Richards*, 549 N.W.2d 218, 219 (Wis. 1996), *aff'd on other grounds*, 520 U.S. 385 (1997). This Court disagreed. Instead, it held that "the police must have a reasonable suspicion that knocking and announcing their presence, *under the particular circumstances*, would be dangerous or futile." *Richards*, 520 U.S. at 394 (emphasis added). The Court did so even while acknowledging that "drug investigation frequently does pose special risks to officer safety." *Id.* at 393.

This Court's unanimous decision in *J.L.* confirms that per se rules are similarly improper in the specific context of *Terry* searches. *J.L.* concerned the question whether an anonymous tip that a person was armed could, by itself, justify a stop and search under *Terry*. *J.L.*, 529 U.S. at 268. This Court held that it could not. An "automatic firearm exception to [the] established reliability analysis would rove too far." *Id.* at 272. The Court cautioned that per se exceptions to Fourth Amendment safeguards create the risk of incremental expansion that can eventually "swallow the rule." *See id.* (importing the logic from *Richards*, 520 U.S. at 393-94, into the context of *Terry* analysis).

2. The Fourth Circuit's guns-indisputably-follow-drugs rule flouts these principles. It permits police to conduct a *Terry* search whenever they reasonably believe a person possesses marijuana, without regard to any of the other circumstances at the time of the search. As a result, federal courts within the Fourth Circuit fail to provide meaningful judicial review of

search decisions in any encounter where marijuana is present; rather, they automatically uphold such searches.

But "the Fourth Amendment is not so easily satisfied." *J.L.*, 529 U.S. at 273. If anything, the Fourth Circuit's "automatic marijuana exception" is less justifiable than the "automatic firearm exception" this Court rejected in *J.L.* or the "automatic felony drug raid exception" this Court rejected in *Richards*. Given that the dangers faced by the officers in *Richards* were not sufficient to justify abandoning a totality-of-the-circumstances approach, the dangers faced by officers encountering a person who possesses a small amount of marijuana cannot justify a per se rule that intrusive *Terry* searches are always permissible. Just as the assumption in *Richards* involved an impermissible "overgeneralization" about dangerousness, 520 U.S. at 394, so too the Fourth Circuit's generalization here is impermissible.

Any presumption that possession of marijuana indicates dangerousness is also undercut by contemporary reality. Officers are likely every day to encounter persons who possess small amounts of marijuana: One in five American adults say they use marijuana and one in seven say they use it regularly. *Weed & the American Family*, MaristPoll (Apr. 17, 2017), https://bit.ly/35ihKN2. Indeed, in this case, Officer Skipper acknowledged that "everybody's kinda got it these days." Vid. 16:34-16:38. Neither the Fourth Circuit nor the Government has explained why it is reasonable to suspect that "everybody's kinda" armed and dangerous these days as well. To the contrary, officers must still consider the "specific and articulable facts" of each individual case and the "specific

reasonable inferences" which the officer is "entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 21, 27.

One of the factors that the Fourth Circuit's rule ignores completely is the pronounced shift in states' attitudes toward possession of marijuana. Within the Fourth Circuit itself, Maryland and West Virginia have legalized medical marijuana, and North Carolina has downgraded simple possession to a non-jailable offense. In light of this reality, it is implausible to believe that possession of a small amount of marijuana indicates that a person is armed and dangerous.

For example, a person who possesses marijuana in Maryland may be a patient with a qualifying medical condition (for example, glaucoma or cancer) who obtains prescribed marijuana from a dispensary licensed and regulated by the State.[12] Nevertheless, the Fourth Circuit's rule allows officers to conduct an intrusive search of this person as he leaves the dispensary. Officers need no individualized indicia of dangerousness, because the Fourth Circuit permits them to rely on a hypothetically "indisputable nexus between drugs and guns," Pet. App. 3a (quoting *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998)). That simply cannot be right.

To be clear, petitioner does not argue that the presence of marijuana is entirely irrelevant to the reasonable suspicion calculus. Rather, he argues only that possession of a small amount of marijuana is not

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[12] The Maryland Medical Cannabis Commission lists more than eighty dispensaries scattered across the state. *Dispensary List*, Md. Med. Cannabis Commission (Oct. 29, 2019), https://bit.ly/2PCbppq.

sufficient by itself to create reasonable suspicion, in contrast to the Fourth Circuit's holding here.

3. The Fourth Circuit's presumption that *Terry* searches are permissible whenever marijuana is present creates a risk of discriminatory and arbitrary police practices. As this Court recognized in *J.L.*, relaxing the standard needed to determine that a person is likely armed "would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search." 529 U.S. at 272. While the Court in *J.L.* was concerned with the potential harassment resulting from private citizens submitting anonymous tips, the Fourth Circuit's rule creates a risk that the guns-follow-marijuana presumption can also lead to harassment by police through *Terry* searches.

As petitioner has already explained, a large part of the American population possesses marijuana at any given time. Of course, police cannot and will not search all these people. But because the Fourth Circuit's rule renders them all subject to search without any additional individualized basis for suspicion, it provides cover for law enforcement to discriminate (consciously or unconsciously) in selecting whom to search.

This risk is not a mere thought experiment. Empirical studies of *Terry* stops already show that minorities are more likely to be stopped than whites, and that once stopped, they are also more likely to be searched. Yet despite this heightened tendency to

search minorities, weapons are actually recovered at a higher rate in searches of whites.[13]

This Court should not permit the Fourth Circuit to use a rule that exacerbates the risk of arbitrary or discriminatory searches. Instead, it should reject the Fourth Circuit's presumption that simple possession of any amount of marijuana renders an individual armed and dangerous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] For citation to and discussion of some of the studies and related litigation involving this issue, see David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 Ohio St. L.J. 501, 531-37 (2018).