No. 19-814

In the Supreme Court of the United States

TONY DESHAWN MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the police violated the Fourth Amendment by patting down petitioner, who was lawfully detained, after police learned that petitioner illegally possessed a controlled substance and was a convicted felon.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.C.):

United States v. *McCoy*, No. 17-cr-240 (Mar. 2, 2018) (denial of petitioner's motion to suppress)

United States v. *McCoy*, No. 17-cr-240 (Oct. 2, 2018) (judgment)

United States Court of Appeals (4th Cir.):

United States v. *McCoy*, No. 18-4731 (July 12, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 773 Fed. Appx. 164. The order of the district court (Pet. App. 6a-18a) is not published in the Federal Supplement but is available at 2018 WL 1144591.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2019. A petition for rehearing was denied on August 26, 2019 (Pet. App. 19a). On November 12, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 26, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina, petitioner was convicted of unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In the afternoon of November 4, 2016, Officers Skipper and Sinnot of the Charlotte-Mecklenburg Police Department spotted a silver Buick traveling with a cracked windshield. Pet. App. 6a-7a. The officers perceived that the Buick's license plate was faded or illegible and that the driver, later identified as petitioner, was not wearing a seat belt. *Id.* at 7a. Based on those observations, the officers caught up with the Buick and initiated a traffic stop. *Ibid.*

Officer Skipper approached the Buick on the driver's side. Pet. App. 7a; see Suppression Hr'g Gov't Ex. 1 (Feb. 28, 2018) (GEX 1) (Officer Skipper's body camera recording). When he opened the Buick's front door to communicate with petitioner, Officer Skipper "immediately" smelled the odor of fresh marijuana. Pet. App. 7a; see C.A. App. 54-55. Officer Skipper addressed petitioner, collected his driver's license and a purchase receipt for the Buick, and walked back to his cruiser to run a records check. Pet. App. 7a-8a. Officer Sinnot, who approached the Buick on the passenger side, also detected the odor of marijuana through a partially open window. *Ibid.* Possession of marijuana is a crime in North Carolina and under federal law. See Pet. 4; N.C. Gen. Stat. § 90-95 (2020); 21 U.S.C. 844(a).

The records check revealed that petitioner had a "felony criminal history," which included two convictions for robbery with a dangerous weapon. C.A. App. 35; Pet. App. 8a; see also Presentence Investigation Report (PSR) ¶¶ 26, 29.[1] After completing the records check, Officer Skipper walked back to the Buick and directed petitioner to step out. Pet. App. 8a; GEX 1, at 05:15-05:45. As petitioner was exiting, Officer Skipper asked if he was carrying any weapons or drugs. GEX 1, at 05:45-06:00. Petitioner did not mention any weapons, but admitted that he had marijuana in his pants pocket. Pet. App. 8a; GEX 1, at 05:45-06:00. Officer Skipper put petitioner in handcuffs and explained that he was not under arrest, but was being detained while Officer Skipper retrieved petitioner's marijuana. Pet. App. 8a; GEX 1, at 06:00-06:20; see also C.A. App. 36.

Officer Skipper felt and took out of petitioner's pockets a pocket knife, a clear plastic bag containing six individually packaged baggies of marijuana, and a pack of cigarettes. Pet. App. 8a-9a; GEX 1, at 06:35-07:15. Officer Skipper then felt a hard object concealed in petitioner's front waistband, which petitioner immediately admitted was a "gun." Pet. App. 8a; GEX 1, at 07:15-07:35. Officer Skipper retrieved the firearm and arrested petitioner. Pet. App. 8a-9a; GEX 1, at 07:35-08:00.

After arresting petitioner, the officers searched the Buick. Pet. App. 9a. They found a digital scale in the glove compartment and a second baggie containing marijuana in the handbag of a passenger who was traveling

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[1] The suppression record does not specify when Officer Skipper learned of the specific offenses in petitioner's criminal history, but establishes that he learned of petitioner's "felony criminal history" when he ran the records check. See C.A. App. 35.

with petitioner. *Ibid.* Petitioner told the officers that the marijuana in the handbag was his. *Ibid.*

2. A federal grand jury in the Western District of North Carolina charged petitioner with unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner moved to suppress the gun, contending, as relevant here, that Officer Skipper conducted the frisk without reasonable suspicion that petitioner was armed or dangerous. Pet. App. 9a.

Following an evidentiary hearing, the district court denied the motion. Pet. App. 6a-18a. The court stated that when "an officer smells the odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana." *Id.* at 14a (citing *United States* v. *Humphries*, 372 F.3d 653, 659 (4th Cir. 2004)). The court also noted that an "admission to the possession of an illegal drug can provide a law enforcement officer with probable cause to arrest and a lawful basis to search the arrestee." *Ibid.* (citing *United States* v. *Day*, 591 F.3d 679, 696 (4th Cir. 2010)); see also C.A. App. 70-71 (government's argument that the pat-down was lawful under the search-incident-to-arrest doctrine).

The district court found that Officer Skipper "had a particularized and objective basis for believing that [petitioner] might be armed and dangerous," which justified Officer Skipper's protective frisk of petitioner. Pet. App. 16a (citing *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002)). The court observed that, although petitioner was "cooperative," he "admitted to being in possession of marijuana." *Ibid.* The court further observed that Officer Skipper had "smelled marijuana

upon the initial encounter," "knew that [petitioner] was a felon," and "discovered marijuana in [petitioner's] pants pocket" before patting down petitioner's waistband and finding a gun. *Ibid.* The court determined that under the circumstances, "objective and particularized facts * * * g[a]ve rise to a reasonable suspicion that [petitioner] was armed and dangerous." *Id.* at 17a.[2]

Petitioner subsequently pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. Petitioner's plea was conditional, preserving his right to appeal the denial of his motion to suppress. C.A. App. 124; see C.A. App. 122-125. The district court sentenced him to 37 months' imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-5a. The court recognized that "to justify a pat down of the driver or a passenger during a traffic stop, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.* at 3a (quoting *Arizona* v. *Johnson*, 555 U.S. 323, 327 (2009)) (brackets and ellipsis omitted). The court quoted its prior decision in *United States* v. *Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998), for the proposition that "when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others." Pet. App. 3a. The court

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[2] The district court also rejected petitioner's claims that the initial traffic stop was unlawful and that Officer Skipper's investigation unlawfully prolonged the traffic stop. Pet. App. 10a-13a, 17a. Petitioner does not renew those claims in this Court.

explained that *Sakyi* had "recognized that 'the indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer.'" *Ibid.* (quoting *Sakyi*, 160 F.3d at 169). The court of appeals found that facts identified by petitioner—that he had a valid driver's license, was cooperative, had been handcuffed, and that the officer left him in the car while running the background check—neither "negate[d] the core logic * * * that a person carrying controlled substances is likely armed" nor "necessarily le[d] to the conclusion that [petitioner] was not a threat to the officers' safety." *Id.* at 4a.

ARGUMENT

Petitioner contends (Pet. 7-24) that police violated the Fourth Amendment by patting him down during a lawful traffic stop. The court of appeals' factbound decision is correct, and petitioner identifies no decision of this Court, another court of appeals, or a state court of last resort that has reached a contrary result on analogous facts. This case would also be a poor vehicle to review the question presented, because petitioner would not be entitled to relief even if this Court agreed with his argument that a suspect's possession of marijuana alone cannot justify a brief pat-down. No further review is warranted.

1. "[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968); see *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2186 (2016) ("[R]easonableness is always the touchstone of Fourth Amendment analysis."). In *Terry*, this Court held that a police officer may make an investigatory stop of a suspect based upon a reasonable and articulable suspicion

that he has or is engaged in criminal activity. 392 U.S. at 21, 30-31. The Court further held that, during such a stop, an officer may perform a limited search of the suspect for weapons if the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27; see *id.* at 30-31.

In upholding the protective search for weapons in *Terry*, the Court balanced the suspect's interest in being free from intrusion against the police officer's "immediate interest * * * in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U.S. at 23. Noting that a large number of law enforcement personnel have been killed in the line of duty, the Court concluded that "we cannot blind ourselves to the need for law enforcement officers to protect themselves * * * in situations where they may lack probable cause for an arrest." *Id.* at 24. "Certainly," the Court emphasized, "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Id.* at 23.

In subsequent decisions approving warrantless protective searches founded on reasonable suspicion, this Court has continued to stress that "[t]he purpose of [such] limited search[es] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams* v. *Williams*, 407 U.S. 143, 146 (1972). *Terry* stops and arrests require "'close range'" contact with criminal suspects that renders police officers "particularly vulnerable," requiring officers to make "'quick decision[s] as to how to protect [themselves] and others from possible danger.'" *Michigan* v. *Long*, 463 U.S. 1032, 1052 (1983) (quoting *Terry*, 392 U.S. at 24, 28). Under those circumstances, police

officers' "immediate interest" in ensuring "that the persons with whom they [are] dealing [are] not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them" will often outweigh a suspect's privacy interests in his person and his immediate surroundings. *Maryland* v. *Buie*, 494 U.S. 325, 333 (1990).

The court of appeals correctly determined that, under "the totality of the circumstances" here, Pet. App. 3a, the officers permissibly frisked petitioner. When Officer Skipper first approached the Buick to communicate with petitioner, he "detected the odor of marijuana coming from the vehicle." *Id.* at 13a. The odor, moreover, "was not that of burning marijuana, but of unused marijuana," suggesting that petitioner had not merely smoked marijuana, but instead possessed enough fresh marijuana to emit a recognizable odor. *Ibid.* Officer Skipper then conducted a routine records check and discovered that petitioner had a "felony criminal history," C.A. App. 35, which included two convictions for robbery with a dangerous weapon, Pet. App. 8a; see p. 3 n.1, *supra*. Minutes later, petitioner admitted that he was carrying marijuana in his pants pocket, without specifying the quantity. Pet. App. 14a.

Possession of marijuana, even in small amounts, is a crime under both North Carolina and federal law. See Pet. 4; N.C. Gen. Stat. § 90-95 (2020); see also 21 U.S.C. 844(a). Petitioner did not dispute below that Officer Skipper lawfully located and removed the illegal drugs. See, *e.g.*, Pet. C.A. Br. 11 (asserting that "Officer Skipper's search of McCoy for weapons *after finding the marijuana in McCoy's pocket* violated McCoy's Fourth Amendment rights") (emphasis added). Officer Skipper discovered that petitioner's marijuana was packaged in

a manner potentially consistent with distribution: "in six individually packaged baggies inside one larger clear baggy." Pet. App. 14a; see, *e.g.*, *United States* v. *Fisher*, 912 F.2d 728, 731 (4th Cir. 1990) ("Baggies and baggie corners are well-known tools of the narcotics distribution trade."), cert. denied, 500 U.S. 919 (1991). Only then did Officer Skipper "continue" (Pet. 5) the pat down and locate a gun in petitioner's waistband. Pet. App. 14a; GEX 1, at 06:00-07:35.

That limited "invasion of [petitioner's] personal security" was "reasonable[] in all the circumstances." *Terry*, 392 U.S. at 19. Before continuing their search to locate petitioner's gun, officers had learned that petitioner was a convicted felon who possessed enough illegal drugs to be smelled from outside the car, that at least some of those drugs were in petitioner's pocket, and that petitioner's marijuana was packaged in a manner potentially consistent with distribution. As petitioner acknowledges (Pet. 11-12), because drug dealers often carry firearms as tools of the trade, a police officer investigating a suspect for drug dealing generally has reasonable suspicion to believe that he is armed and dangerous, and may therefore frisk the suspect for a weapon. See, *e.g.*, *United States* v. *Arnott*, 758 F.3d 40, 45 (1st Cir. 2014); *United States* v. *Davis*, 726 F.3d 434, 440 (3d Cir. 2013); *United States* v. *Branch*, 537 F.3d 582, 589 (6th Cir.), cert. denied, 555 U.S. 1080 (2008). Under these circumstances, the officers permissibly frisked petitioner's waistband to ensure he was not armed, and there discovered a gun.

2. Petitioner errs in contending that the Fourth Amendment required the officers to accept the danger that petitioner had a gun on his person as the cost of investigating petitioner's criminal activity.

a. Petitioner and his amicus contend (Pet. 19-21; Amicus Br. 3-6) that, by relying on the notion that possession of "illegal drugs" "presumptively creates a reasonable suspicion of danger to the officer," Pet. App. 3a (quoting *United States* v. *Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998)), the court of appeals' decision conflicts with this Court's decisions in *Richards* v. *Wisconsin*, 520 U.S. 385 (1997), and *Florida* v. *J. L.*, 529 U.S. 266 (2000). But on the facts of this case, petitioner's possession of marijuana was not the only factor supporting the officers' search. As noted above (and as the district court correctly found), whatever their import in isolation, the combination of petitioner's felony criminal history, petitioner's (admitted) possession of illegal drugs, and the packaging of those drugs in a manner potentially consistent with distribution amply supported reasonable suspicion that petitioner was armed and dangerous. See pp. 8-9, *supra*.

Because this is not a case in which police relied solely on a suspect's potentially legal possession of a small amount of marijuana in order to justify a frisk for weapons, contra Pet. 22-23, the court of appeals' reliance, in an unpublished, non-precedential decision, on a rebuttable inference based on petitioner's drug possession does not warrant review. In any event, neither *Richards* nor *J. L.* conflicts with the decision below. In *Richards*, this Court rejected a "blanket exception" to the Fourth Amendment's knock-and-announce requirement—*i.e.*, the requirement that officers announce their identity and purpose before entering a home to execute a search warrant—for the "entire category" of "felony drug investigations." 520 U.S. at 388, 396. Such a "blanket rule," this Court reasoned, would "impermissibly insulate[] * * * from judicial review" some cases that do not

pose "special risks to officer safety and the preservation of the evidence." *Id.* at 393. "Instead," the Court held, "in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Id.* at 394. Similarly, in *J. L.*, this Court rejected a per se rule that police have reasonable suspicion to stop and frisk a person whenever they receive an anonymous tip that the person is carrying a gun, regardless of the tip's reliability. 529 U.S. at 268. The Court reasoned that such "an automatic firearm exception to our established reliability analysis would rove too far." *Id.* at 272.

Neither *Richards* nor *J. L.* establishes that the police violated the Fourth Amendment by patting down petitioner here, or that the court of appeals' decision was unsound. Unlike the rigid rules at issue in *Richards* and *J. L.*, the Fourth Circuit has not created a "blanket," *Richards*, 520 U.S. at 393, "*per se*," *id.* at 394, or "automatic," *J. L.*, 529 U.S. at 272, exception to a general Fourth Amendment rule (here, the rule that before frisking a suspect, the officers must have reasonable suspicion, based on the totality of the circumstances, that the individual is armed and dangerous). Rather, as the panel reiterated, the Fourth Circuit in all cases "measure[s] reasonable suspicion against the totality of the circumstances," and officers may reasonably suspect that an individual is dangerous based on his or her possession of illegal drugs only "'*in the absence of factors allaying [the officer's] safety concerns*.'" Pet. App. 3a (quoting *Sakyi*, 160 F.3d at 169) (emphasis added). And, consistent with these principles, the panel in this case expressly considered the mitigating factors cited by petitioner. *Id.* at 3a-4a.

Petitioner characterizes the Fourth Circuit's "presumption" as "extremely strong," a "per se" rule, an "'automatic marijuana exception,'" and a "guns-indisputably-follow-drugs rule." Pet. 8, 20-21. None of these labels accurately describes the Fourth Circuit's approach, which makes the drug-based inference of dangerousness rebuttable by any "factors allaying [the officer's] safety concerns." Pet. App. 3a (quoting *Sakyi*, 160 F.3d at 169). Nor is it significant that, in *United States* v. *Rooks*, 596 F.3d 204, cert. denied, 562 U.S. 864 (2010), the Fourth Circuit did not expressly address a criminal defendant's contention that his purportedly "polite, calm and compliant demeanor during a traffic stop" should have overcome the frisking officer's suspicion that he was armed and dangerous. Pet. 8 (citation omitted). Courts of appeals are not required to expressly address every piece of evidence cited by a party. And, in any event, no per se rule was applied here, where the court of appeals did discuss petitioner's allegedly "ameliorating factors." Pet. 8; see Pet. App. 3a-4a. Contrary to petitioner's suggestions, therefore, the Fourth Circuit's approach does not artificially "'insulate[]' decisions to search 'from judicial review.'" Pet. 19 (quoting *Richards*, 520 U.S. at 393).

To the contrary, that approach accomplishes precisely what petitioner acknowledges the Fourth Amendment allows—namely, it identifies "an especially salient fact [that] is enough to support an inference that a suspect is armed and dangerous," provided that "additional facts known to the officer at the time [do not] undercut that inference." Pet. 19. And this Court's recent decision in *Kansas* v. *Glover*, 140 S. Ct. 1183 (2020), endorsed an approach similar to the Fourth Circuit's approach here. Specifically, the Court held that an officer

who sees a vehicle registered to an unlicensed driver has reasonable suspicion to stop the car, while making clear that "the presence of additional facts might dispel reasonable suspicion." *Id.* at 1191. The Fourth Circuit's analogous approach here is no more an invalid per se rule than the approach endorsed in *Glover*.

b. Petitioner and his amicus also attack (Pet. 21-23; Amicus Br. 6) the factual premise of the Fourth Circuit's approach—namely, that when an "officer has a reasonable suspicion that illegal drugs are in [a] vehicle," the "nexus between guns and drugs presumptively creates a reasonable suspicion of danger to the officer." Pet. App. 3a (quoting *Sakyi*, 160 F.3d at 169). They assert that "[o]ne in five American adults say they use marijuana" and "one in seven say they use it regularly," and observe that some States have "legalized medical marijuana," and others have "downgraded simple possession to a non-jailable offense." Pet. 21-22; accord Amicus Br. 6 (similar). But that does not suggest that any officer lacks safety concerns after stopping a car that he reasonably suspects to contain an as-yet-undetermined quantity of drugs.

In the context of illegal narcotics, like marijuana, this Court has repeatedly recognized "the links between drugs and violence." *Richards*, 520 U.S. at 391 n.2 (citing *Michigan* v. *Summers*, 452 U.S. 692, 702 (1981)); see *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("Studies * * * demonstrate a direct nexus between illegal drugs and crimes of violence."). Consistent with that long-recognized nexus, and as petitioner acknowledges (Pet. 11-12 & n.5), "[s]everal Courts of Appeals have held it *per se* foreseeable for people carrying significant amounts of illegal drugs to

be carrying guns as well." *J. L.*, 529 U.S. at 273 (citing *Sakyi*, 160 F.3d at 169; *United States* v. *Dean*, 59 F.3d 1479, 1490, n.20 (5th Cir. 1995), cert. denied, 516 U.S. 1064, and 516 U.S. 1082 (1996); *United States* v. *Odom*, 13 F.3d 949, 959 (6th Cir.), cert. denied, 511 U.S. 1094, and 513 U.S. 836 (1994); *United States* v. *Martinez*, 958 F.2d 217, 219 (8th Cir. 1992)); see p. 9, *supra* (citing cases holding that reasonable suspicion of drug dealing supports the inference that the suspect is armed and dangerous).[3]

Given the enhanced risks that officers face when they confront drug dealers, an officer who, like Officer Skipper, learns that a detained suspect is presently transporting an unspecified amount of illegal narcotics is not required, as petitioner suggests, to take the "unnecessary risk[]" of assuming that the suspect is merely a drug user. *Terry*, 392 U.S. at 23. He is, instead, reasonably permitted to infer, in the absence of credible information to the contrary, that the amount of drugs at issue may be "significant," *J. L.*, 529 U.S. at 273, and that the suspect is transporting the drugs to distribute them. See *Terry*, 392 U.S. at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given * * * to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."). An officer who, for example, smells unburnt marijuana in a car may

[3] It is undisputed that possession of any amount of marijuana in North Carolina is both a state and a federal crime. See Pet. 4; 21 U.S.C. 844(a). This case therefore does not present questions about whether possession of any small quantities of marijuana where permitted by state (but not federal) law can support an officer's reasonable suspicion of danger.

have no reliable way of ascertaining how much marijuana is in the car. Before exposing himself by searching, he may reasonably take the same precautions that are appropriate whenever a suspect is believed to be dealing drugs and therefore potentially armed and dangerous. And those precautions were particularly appropriate here, where petitioner not only possessed illegal narcotics, but possessed drugs that were packaged in a manner consistent with distribution *and* had a felony criminal history.

3. Petitioner also errs in contending (Pet. 8-13) that the court of appeals' decision conflicts with the precedent of the D.C. Circuit and of several state courts of last resort. Petitioner's citation (Pet. 10-11) of *United States* v. *Price*, 409 F.3d 436 (D.C. Cir. 2005)—the federal circuit decision petitioner identifies in support of his claimed conflict—does not reflect a clear disagreement between the Fourth and D.C. Circuits. In *Price*, the D.C. Circuit *rejected* a criminal defendant's claim that his Fourth Amendment rights had been violated by an officer's frisk, finding that, on the facts presented, the officer had reasonable suspicion that the defendant may be armed and dangerous. *Id.* at 442. Petitioner points to one sentence in *Price* stating that the panel did "not mean to suggest that a *Terry* frisk would have been justified absent the totality of the[] circumstances" presented in that case. *Ibid.* That passing caveat does not demonstrate a conflict with the decision below. And even assuming that the panel in *Price* viewed the facts there as close to the line, any doubt as to the lawfulness of a frisk on those facts—a tip indicating that the driver of the vehicle in which the defendant was a passenger "possessed at least a quarter pound of marijuana in the car," *id.* at 438; see *id.* at 442—would not apply here,

where the drug-related information came directly from petitioner (not a third-party informant), and petitioner admitted that he (not some fellow traveler) was the owner of the drugs.

Similarly, each of the state decisions cited by petitioner (Pet. 9-10) addressed circumstances that were substantially different from Officer Skipper's frisk in this case, and none adopted a rule that would require suppression in petitioner's case. In *Upshur* v. *United States*, 716 A.2d 981 (1998), for example, the D.C. Court of Appeals declined to "impute a safety concern from the mere fact that the officers believed appellant was buying drugs" shortly before he was stopped. *Id.* at 984. Unlike petitioner, however, the defendant in *Upshur* did not admit transporting drugs, nor did the officers know that the suspect had a felony criminal history. See *id.* at 982-985. And although *Upshur* stated that the "connection" between drugs and weapons "standing alone is insufficient to warrant a police officer's reasonable belief that a suspect is armed and dangerous," it reaffirmed that "'drugs and weapons go together.'" *Id.* at 984 (quoting *Griffin* v. *United States*, 618 A.2d 114, 124 (D.C. 1992)).

Petitioner observes (Pet. 10) that in *Furr* v. *State*, 499 S.W.3d 872 (2016), the Texas Court of Criminal Appeals declined 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." *Id.* at 880-881. But the Fourth Circuit has not adopted such a "per se" "rule" either. In any event, Texas courts recognize that individuals who, like petitioner, are reasonably suspected of being "'involved in the drug business,'" as opposed to engaging in "mere drug use," may be dangerous. *Id.* at 881 (citation omitted). Petitioner

also notes that in *State* v. *Baker*, 229 P.3d 650 (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.'" Pet. 10 (quoting *Baker*, 229 P.3d at 666). The circumstances known to Officer Skipper, however, gave rise to reasonable suspicion that petitioner could be involved in drug dealing, not merely possession of user quantities. See pp. 8-9, *supra*. And petitioner's felony criminal history further supported the reasonable inference that he was armed and dangerous. *Ibid.*

The cases petitioner cites (Pet. 10) from Nevada and Pennsylvania likewise do not conflict with the Fourth Circuit's decision in this case. In *Commonwealth* v. *Grahame*, 7 A.3d 810 (2010), the Pennsylvania Supreme Court stressed that "reasonable suspicion is evaluated under the totality of the circumstances." *Id.* at 813. That view is consistent with the decision below, which likewise reiterated that reasonable suspicion is "measure[d] * * * against the totality of the circumstances." Pet. App. 3a. And in *Somee* v. *State*, 187 P.3d 152 (2008), the Supreme Court of Nevada made clear that "reasonable articulable suspicion of narcotics activity * * * may give rise to a reasonable articulable suspicion that a suspect poses a danger to the officer." *Id.* at 158. That view is not materially different from the Fourth Circuit's, which deems a protective frisk justified based on the suspect's drug possession only "in the absence of factors allaying [the officers'] safety concerns." Pet. App. 3a (quoting *Sakyi*, 160 F.3d at 169).

Furthermore, neither *Grahame* nor *Sommee* involved circumstances comparable to those presented here. *Grahame* found the indicia of the defendant's

dangerousness "insufficient" because the officers' suspicion was based on her "mere proximity to *others* engaged in criminal activity." 7 A.3d at 817 (emphasis added). It also stressed that (unlike here) none of the officers "knew if [the defendant] had a criminal record." *Ibid.* Similarly, in *Somee*, the officers' inference of dangerousness was based on "an anonymous accusation that [the] suspect [was] engaged in narcotics activity," and the court remanded for an evidentiary hearing into whether the search was justified on the facts. 187 P.3d at 158. Neither *Grahame* nor *Somee* shows that the Pennsylvania or Nevada courts would have reached a different result on the facts of this case.

Finally, petitioner's reliance (Pet. 9) on *Norman* v. *State*, 156 A.3d 940 (Md.), cert. denied, 138 S. Ct. 174 (2017), does not suggest a conflict that would warrant this Court's intervention. *Norman* stated that officers may not frisk a suspect where "a law enforcement officer detects an odor of marijuana emanating from a vehicle with multiple occupants[] and * * * there is no other circumstance that gives rise to reasonable articulable suspicion that a vehicle's occupant is armed and dangerous." *Id.* at 967; see also *id.* at 943-944 (same). To the extent that its approach differs from the Fourth Circuit's, those differences are not implicated by this case. Here, as discussed, circumstances other than the odor of marijuana contributed to a "reasonable articulable suspicion" that petitioner was "armed and dangerous." *Id.* at 967. Moreover, *Norman* expressly *rejected* the notion that the Fourth Circuit had "create[d] a blanket rule" invariably linking drug possession and dangerousness, *id.* at 966—the very premise of the petition here.

4. Even if the question presented warranted this Court's review, this case would be an unsuitable vehicle to address it because at least two independent grounds support the lower courts' decisions.

a. First, Officer Skipper's pat-down of petitioner's pockets and waistband was a valid search incident to arrest supported by probable cause. See Gov't C.A. Br. 12-13; C.A. App. 70-71; Pet. C.A. Reply Br. 1, 3. Petitioner's admission that he possessed illegal drugs gave officers probable cause to arrest petitioner and to search his person incident to that arrest. See *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (when police officers make an arrest, they may search the arrestee's person and the area "within his immediate control" without obtaining a warrant). And in *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), this Court held that the search-incident-to-arrest doctrine justified a search that "preceded the arrest," where the search was based on probable cause of a drug-related crime. *Id.* at 111; see *id.* at 100-101.

In the proceedings below, petitioner resisted application of the search-incident-to-arrest exception on the ground that Officer Skipper initially "d[idn't] intend" to arrest petitioner for possessing marijuana. Pet. C.A. Reply Br. 3. As a threshold matter, although Officer Skipper initially indicated that petitioner was not under arrest, that was *before* Officer Skipper found drugs packaged in a manner consistent with distribution, which preceded the challenged frisk for weapons. See p. 3, *supra*; GEX 1, at 05:45–07:00. In any event, even

accepting petitioner's factual assertions about Officer Skipper's subjective intent at face value, his legal conclusion—that a search incident to arrest may precede the arrest only if the officer subjectively "intend[ed]," at the time of the search, to arrest the suspect based on the facts known to the officer before the search—is meritless. This Court has "repeatedly" held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (brackets and citation omitted). The objective circumstances of the search at issue here fall squarely within *Rawlings*: Officer Skipper had probable cause to arrest petitioner before he frisked him, and he did in fact arrest petitioner immediately thereafter. See 448 U.S. at 111.

b. In addition, the good-faith exception to the exclusionary rule provides an independent basis for affirming the district court's denial of petitioner's motion to suppress. See Gov't C.A. Br. 20 (arguing that the good-faith exception applies).

As this Court has explained, the exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted). "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987). And because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity,"

the exclusionary rule does not apply "where [an] officer's conduct is objectively reasonable." *Leon*, 468 U.S. at 919. Instead, to justify suppression, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" for the exclusion of probative evidence. *Herring* v. *United States*, 555 U.S. 135, 144 (2009). "[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent," this Court has held, the exclusionary rule "does not apply." *Davis* v. *United States*, 564 U.S. 229, 249-250 (2011).

As the government argued in the court of appeals, the good-faith doctrine forecloses suppression in this case, even if Officer Skipper's frisk were held to violate the Fourth Amendment. Gov't C.A. Br. 20. Nearly two decades before the frisk in this case, the Fourth Circuit held that "when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others." *Sakyi*, 160 F.3d at 169; see *Rooks*, 596 F.3d at 210 ("[U]nder our precedent, an officer who has reasonable suspicion to believe that a vehicle contains illegal drugs may order its occupants out of the vehicle and pat them down for weapons."). Officer Skipper in this case had such reasonable suspicion, and it was reasonable for him to conform his conduct to the Fourth Circuit's precedent. At a minimum, petitioner cannot contend that the officers displayed anything approaching the sort of "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights"

that is required to justify the high costs of suppression. *Davis*, 564 U.S. at 238 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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