No. 16-1547

In the Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

JOSEPH NORMAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Maryland Court of Appeals, applying well-established precedent from this Court, properly hold that Norman's frisk violated the Fourth Amendment, where it found based on its review of the totality of the circumstances that the police did not have reasonable articulable suspicion to believe that Norman was armed and dangerous?

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A. The Court should deny the petition for a writ of certiorari because there is no conflict between the Maryland Court of Appeals and the United States Court of Appeals for the Fourth Circuit.

The State of Maryland asserts in its petition for a writ of certiorari that an "untenable" "rift" exists between the Fourth Circuit Court of Appeals' decisions in *United States v. Sakyi,* 160 F.3d 164 (1998), and *United States v. Rooks*, 596 F.3d 204 (2010), and the Maryland Court of Appeals' decision in *Norman v. State*, 156 A.3d 940 (Md. 2017); Pet. App. 1-80. Pet. 7. According to the State, the rift exists because the Fourth Circuit answered "yes" and the Maryland Court answered "no" to the following question: "When a traffic officer has probable cause to believe that a validly stopped car contains illegal drugs, is it reasonable under the Fourth Amendment for the officer also to frisk a passenger for weapons before undertaking a search of the car?" Pet. 7. Contrary to the State's assertion, no rift exists.

In the "pathmaking decision," *Terry v. Ohio*, 392 U.S. 1 (1968), the Court established that an officer may conduct an investigatory stop if he or she "reasonably suspects that the person apprehended is committing or has committed a criminal offense" and that the officer may frisk the detained individual if the officer "reasonably suspect[s] that the person stopped is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). Since *Terry*, the Court has utilized a totality of the circumstances analysis to determine whether reasonable suspicion exists in a given case.

See, *e.g.*, *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (stating that the reasonable suspicion standard "takes into account 'the totality of the circumstances—the whole picture'") (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)); *United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."). A close review of *Sakyi*, which is the leading Fourth Circuit case and the case on which *Rooks* relies, and *Norman*, reveals that their divergent outcomes were not the result of any rift but rather were the result of the Courts' consideration and application of the unique factual circumstances underlying each stop and attendant frisk. Certiorari review, therefore, is not merited on this ground.

In *Sakyi*, a federal police officer stopped a car for a traffic violation on the George Washington Parkway. *Sakyi,* 160 F.3d at 165. The portion of the parkway on which the stop occurred was a high-crime area known for weapons and drugs. *Id.* at 166. When the officer approached the car, he asked the driver, Gunn, for his license and registration. *Id.* at 165. Gunn said that he "did not have his license with him," but he opened the glove compartment to retrieve the registration. *Id.* As he did, the officer saw a cigar box. *Id.* at 166. From his experience in hundreds of cases, the officer knew that cigar boxes and marijuana frequently "were found together." *Id.*

The officer asked Gunn for a second time if he had a license, and this time Gunn said that he "never had a license." *Id.* The officer also asked Sakyi if he had a driver's license, and Sakyi said that he did not have his license with him. *Id.* While the officer waited for information from communications regarding the status of Gunn's license, he removed Gunn from the car and asked for, and received, permission to search the car. *Id.* The officer then learned that Gunn's license was revoked. *Id.* At that time, the officer arrested Gunn, waited for backup to arrive, and placed Gunn in a cruiser. *Id.* The officer also asked Sakyi, who was wearing loose clothing, to get out of the car. *Id.* When Sakyi did so, the officer frisked him. *Id.* During the frisk, the officer recovered crack cocaine. *Id.*

Sakyi filed a motion to suppress, which was denied by the District Court. *Id.* at 166-67. He appealed that decision to the Fourth Circuit. That Court began its analysis by reviewing this Court's decisions in *Terry v. Ohio*, *supra, Pennsylvania v. Mimms*, 434 U.S. 106 (1977), *Michigan v. Long*, 463 U.S. 1032 (1983), and *Maryland v. Wilson*, 519 U.S. 408 (1997). *Id.* at 167-68. After that review, the Fourth Circuit said the following:

> Accordingly, in the case before us, we conclude that we may not rely on a generalized risk to officer safety to justify a routine 'pat-down' of all passengers as a matter of course. Because a frisk or 'pat down' is substantially more intrusive than an order to exit a vehicle or to open its doors, we conclude that an officer must have justification for a frisk or a 'pat-down' beyond the mere justification for the traffic stop.

The holdings in *Terry* and *Long* permitted frisks only when the officer perceived an appropriate level of suspicion of criminal activity and apprehension of danger, and we conclude that such a showing is necessary here. That showing, however, may be satisfied by an officer's objectively reasonable suspicion that drugs are present in a vehicle that he lawfully stops. Moreover, when drugs are suspected in a vehicle and the suspicion is not readily attributable to any particular person in the vehicle, it is reasonable to conclude that all occupants of the vehicle are suspect. They are in the restricted space of the vehicle presumably by choice and presumably on a common mission. Furthermore, as we have previously noted, guns often accompany drugs. *See Stanfield*, 109 F.3d at 984; *United States v. Perrin*, 45 F.3d 869, 873 (4th Cir. 1995) (noting that 'it is certainly reasonable for an officer to believe that a person engaged in the selling of crack cocaine may be carrying a weapon for protection'). In the absence of ameliorating factors, the risk of danger to an officer from any occupant of a vehicle he has stopped, when the presence of drugs is reasonably suspected but probable cause does not exist, is readily apparent.

Accordingly, we hold that in connection with a lawful traffic stop of an automobile, 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.
>
> In the case before us, [the officer] had a reasonable suspicion, based on several hundred cases in which a Phillies Blunt cigar box was associated with marijuana, that drugs were present in the vehicle he stopped, and he could not attribute the suspected drugs solely to the driver because the Phillies Blunt cigar box was in the glove box. The indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer.
>
> *Moreover, the other factors [the officer] encountered did not allay his suspicion and apprehension but heightened them. After [the officer] stopped the vehicle, neither Sakyi nor the driver could present any identification, and the driver lied twice about the status of his license. The stop occurred in the high crime area near where Washington Street intersects with the George Washington Parkway, across from two of the most common places along the parkway for violations involving drugs and guns. And finally, when [the officer] asked Sakyi to exit the vehicle, he could not readily tell whether Sakyi was armed because Sakyi wore loose clothing.*

Id. at 168-69 (emphasis added).

In its petition, the State characterizes the Fourth Circuit's holding in *Sakyi* as permitting an officer to frisk a passenger in a validly stopped car any and every time the officer has probable cause to believe the car contains illegal drugs and intends to search the car as

a result. Pet. 7, 11. The Fourth Circuit's holding, however, is not quite so broad. Despite the fact that the Court initially suggested that the "appropriate level of suspicion of criminal activity and apprehension of danger" "may be satisfied by an officer's objectively reasonable suspicion that drugs are present in a vehicle that he lawfully stops," it ultimately held that there must be an "absence of factors allaying [an officer's] safety concerns" before the officer may frisk a passenger under such circumstances. *Sakyi*, 160 F.3d at 169. Furthermore, when it applied its holding to the facts before it, the Court explicitly recognized that the "other factors" the officer faced in that case - such as the fact that the stop occurred in a high crime area, the fact that the driver lied about his license status, the fact that Sakyi could not present any identification, and the fact that Sakyi wore loose clothing that might have concealed a weapon - "did not allay [the officer's] suspicion and apprehension but heightened them." *Id.* Although the Fourth Circuit articulated a presumption and did not use the term "totality of the circumstances," in the end, it took into account all of the circumstances of the stop as it determined whether Sakyi's frisk was constitutionally permissible.

The Maryland Court of Appeals also looked to the totality of the circumstances as it determined whether Norman's frisk conformed to the Fourth Amendment. In *Norman*, a trooper stopped a car with an inoperable tail light. Pet. App. 4. When the trooper "made contact" with the driver of the car, he detected the "strong odor" of "fresh marijuana" coming from the passenger compartment. *Id.* The trooper, who intended to search the car, had the passengers get out of the car and called for backup. *Id.* After two other

officers arrived, the trooper frisked Norman, who was the front seat passenger. Pet. App. 4-5. That frisk revealed a bag of marijuana.[1] Pet. App. 5. The trooper then arrested Norman and took him to the State Police Barrack, where a search revealed another bag of marijuana. *Id.* The trial court denied Norman's motion to suppress. Pet. App. 8.

The Court of Appeals ultimately reversed the trial court's ruling. The Court's seven judges, however, were fractured, leaving no majority opinion. Two judges joined the plurality opinion; one judge joined the judgment only; two judges concurred; and two judges dissented. Pet. App. 1, 68, 69, 75.

After an exhaustive examination of case law from Maryland, as well as other jurisdictions, Pet. App. 13-42, the plurality addressed *Sakyi*. It recognized that the Fourth Circuit "did not create a blanket rule that, based on a connection between drugs and guns, a law enforcement officer may frisk an occupant of a vehicle with multiple occupants where the officer suspects the vehicle contains drugs." Pet. App. 55. Instead, it explained that the Fourth Circuit "create[d] a presumption of reasonable articulable suspicion to frisk an occupant of a vehicle with multiple occupants based on an odor of marijuana alone" "which could be overcome by circumstances allaying a law enforcement officer's safety concerns." *Id.* The plurality expressed

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[1] Although Norman did not challenge the scope of the frisk in the Court of Appeals, the plurality opinion noted that the "case's circumstances do not give confidence in the determination that [the trooper] conducted only a frisk for weapons and not a search of Norman . . .." Pet. App. 65, n.8.

its disagreement with that analysis, particularly the use of a presumption based on the suspected presence of drugs. Pet. App. 55-56.

Instead of adopting the Fourth Circuit's presumption, the plurality utilized the traditional totality of the circumstances analysis long espoused by this Court, and held:

> We hold that, where an odor of marijuana emanates from a vehicle with multiple occupants, a law enforcement officer may frisk, *i.e*, pat down, an occupant of the vehicle if an additional circumstance or circumstances give rise to reasonable articulable suspicion that the occupant is armed and dangerous. Stated otherwise, for a law enforcement officer to have reasonable articulable suspicion to frisk one of multiple occupants of a vehicle from which an odor of marijuana is emanating, the totality of circumstances must indicate that the occupant in question is armed and dangerous.

Pet. App. 3. The plurality then implicitly rejected the State's argument that the trooper had reasonable suspicion to believe that Norman and the other occupants were engaged in drug trafficking, Pet. App. 12, 60-64, and it recognized that there were no circumstances, beyond the smell of marijuana, to indicate that Norman was armed and dangerous. Specifically, the Court said:

> [The trooper] did not testify that Norman made furtive movements, moved around inside the vehicle, or otherwise behaved suspiciously; that Norman attempted to flee; that there were any

> bulges in Norman's pockets; that Norman's clothing was baggy, large, or otherwise easily able to conceal a weapon; that Norman's hands were not visible; that Norman appeared nervous; that Norman provided a fake name or false identification; that Norman said something that was either false or inconsistent with something that another one of the vehicle's occupants had said; that Norman was hostile, argumentative, or otherwise uncooperative; that Norman failed to comply with [the trooper's] instructions; that Norman had a criminal record or was known to be violent or carry a gun; or even that the traffic stop took place in a high-crime area and/or an area that was known for drug activity or gun violence.

Pet. App. 66. In light of the foregoing, the plurality found there "were insufficient circumstances giving rise to reasonable articulable suspicion that Norman was armed and dangerous to justify the frisk." Pet. App. 67.

The concurring judges agreed that Maryland should not adopt the Fourth Circuit's presumption approach, Pet. App. 73, and they joined in the plurality's holding that "for a law enforcement officer to have reasonable articulable suspicion to frisk one of multiple occupants of a vehicle from which an odor of marijuana is emanating, the totality of the circumstances must indicate that the occupant in question is armed and dangerous. An odor of marijuana alone emanating from a vehicle with multiple occupants does not give rise to reasonable articulable suspicion that the vehicle's occupants are armed and dangerous and

subject to frisk." Pet. App. 70. The concurring judges also rejected the State's argument that "a passenger in a vehicle that smells of raw marijuana is involved in drug distribution." Pet. App. 71. In doing so, they relied heavily on the fact that the Maryland legislature had recently decriminalized possession of small amounts of marijuana. Pet. App. 71-72. Finally, the concurring judges concluded, "The smell of marijuana – no matter how strong – did not give [the trooper] reasonable suspicion that Norman and his companions were armed and dangerous. To conduct a *Terry* frisk, police officers must have evidence pointing to weapons, not only marijuana. I join in [the plurality]'s holding that the *Terry* frisk was an unreasonable search in violation of the Fourth Amendment." Pet. App. 74.

As the foregoing demonstrates, the Fourth Circuit in *Sakyi* did not adopt a *per se* rule that police, in preparation for a search of a car, may frisk a car's occupants any and every time they have reasonable suspicion to believe the car contains marijuana, just as the Maryland Court of Appeals in *Norman* did not adopt a *per se* rule that police, in preparation for a search of a car, may never frisk a car's occupants when they have probable to believe the car contains marijuana. Instead, both Courts reviewed the circumstances, above and beyond the suspected presence of marijuana, to determine whether the challenged frisks were constitutionally permissible. The fact that the Fourth Circuit placed greater weight on one of the circumstances, the suspected presence of

drugs, than the Maryland Court of Appeals did hardly renders this case worthy of the Court's review. [2] [3]

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[2] The State also cites *United States v. Rooks*, in support of its assertion that there is a conflict between the Maryland Court of Appeals and the Fourth Circuit. Pet. 7, 9-11. It does so, however, without any examination of the facts or legal analysis in the case. The State's failure to examine the opinion, much less to examine it rigorously, is most likely explained by the fact that *Rooks*, which post-dates *Sakyi*, itself contained no analysis of the underlying issue and simply cited to *Sakyi* for the proposition that "under 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." *Rooks*, 596 F.3d at 210. That, of course, was only one part of the holding in *Sakyi*. The *Rooks* Court failed to acknowledge the second part of *Sakyi's* holding – that there must be an "absence of factors allaying [an officer's] safety concerns" before the officer may frisk a passenger. To the extent that *Rooks*, in which the Court admittedly did not engage in a totality of the circumstance analysis when it determined that the officer was authorized to conduct a frisk because he "detected marijuana" in the car, *id.* at 210, is evidence of a conflict, it is a conflict that is the apparent result of a failure to faithfully apply Fourth Circuit precedent to a Fourth Circuit case, and not a conflict that is the result of a fundamental disagreement with the Maryland Court of Appeals about how the reasonable suspicion analysis should be applied in cases involving traffic stops where drugs are believed to be present. As such, it is a conflict with which the Court should not be concerned.

[3] In a footnote, the State cites to three state intermediate appellate court decisions, *People v. Collier*, 166 Cal. App. 4th 1374 (2008), *Patterson v. State*, 958 N.E.2d 478 (Ind. Ct. App. 2011), and *Lark v. State*, 759 N.E.2d 275 (Ind. Ct. App. 2001), and asserts that they follow a rule that is similar to the Fourth Circuit's rule. Pet. 9, n.4. To the contrary, the Courts in *Collier* and *Patterson* applied a traditional totality of the circumstances analysis, see *Collier*, 166 Cal. App. 4th at 1377; *Patterson*, 958 N.E.2d at 487, and the Court in *Lark* did not address whether the officer had reasonable

B. The Court should deny the petition for a writ of certiorari because the State seeks a bright-line rule that was not raised in, or addressed by, the Maryland Court of Appeals and because the State alternatively asserts that the Maryland Court of Appeals misapplied "a properly stated rule of law".

The State next argues that the Court should grant its petition "to address whether and under what circumstances probable cause to conduct a *Carroll* search also justifies a frisk of a passenger," Pet. 12, and asserts that the officer's frisk in this case was reasonable "on either of two distinct theories," Pet. 13. The first theory the State advances is that "as a bright-line rule, an officer should be able to frisk a car's passenger whenever there is probable cause – whatever its basis – to search the car." Pet. 13. As an initial matter, the rule proposed by the State is breathtaking in its scope, and adoption of it would permit pat downs of passengers in a staggering number of situations, including stops in which the police have probable cause to believe the car contains evidence of very minor crimes, such as shoplifting. It is a rule, moreover, that the State never asked the Maryland Court to adopt. Because the State did not argue below, and the Maryland Court did not address, the bright-line rule the State now advocates, this case would be a particularly poor vehicle for the Court to consider adoption of such a rule. See *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (refusing to address the merits of an

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suspicion to frisk the defendant, see *Lark*, 759 N.E.2d at 276; Pet. App. 59.

argument raised by the respondent, which had not been raised in, or decided by, the Ninth Circuit of Appeals, and explaining that "[t]he complex nature of [respondent's] claim and its broad implications suggest that its consideration by the lower courts would help in its resolution"); *United States v. Williams*, 504 U.S. 36, 41 (1992) (noting the Court's "traditional rule" that a grant of certiorari is precluded "only when 'the question presented was not pressed or passed upon below'").

Furthermore, there is very little support for the argument that a bright-line rule would be appropriate in this situation. In the vast majority of cases involving the Fourth Amendment, the Court has rejected the use of a *per se*, or bright-line, rule. See *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Richards v. Wisconsin*, 520 U.S. 385 (1997); *Maryland v. Buie*, 494 U.S. 325 (1990); *Florida v. Bostick*, 501 U.S. 429 (1991); *United States v. Sharpe*, 470 U.S. 675 (1985). *Mimms* and *Wilson*, which the State cites, Pet. 13, n.7, did involve the adoption of a *per se* rule, but they are easily distinguished. The Court held in those cases that when an officer conducts a lawful traffic stop, which necessarily results in the detention of the driver and any passengers, the officer is permitted to require the driver and any passengers to exit the car for the duration of the stop. *Mimms*, 434 U.S. at 111; *Wilson*, 519 U.S. at 415. In justifying its adoption of that rule, the Court relied heavily on the fact that the intrusion placed on the driver and passengers by the order to exit was "minimal" or "*de minimis*." *Mimms*, 434 U.S. at 111; *Wilson*, 519 U.S. at 415. In contrast, as the Court recognized in *Terry*, a frisk involves "a severe, though brief, intrusion upon a cherished personal security"

which "must be an annoying, frightening, and perhaps humiliating experience."[4] *Terry*, 393 U.S. at 24-25.

The second theory the State advances is that "even under the traditional totality-of-the-circumstances test for reasonable suspicion, the facts known to [the trooper in this case] supplied reasonable ground to believe that Norman may have been armed and dangerous." Pet. 14. The State argues that the Court of Appeals took "too limited a view of the evidence," Pet. 16, quibbles with its determination that the smell of marijuana did not provide reasonable suspicion to believe Norman and his passengers were engaged in drug trafficking, Pet. 15-16, and urges that the decision "should be corrected." Pet. 16. That theory is merely a veiled invitation for the Court to act as an error correcting court, which, of course, is not a role the Court usually plays. See Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the

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[4] In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), Justice Scalia characterized the frisk as an "indignity" and described a typical pat down as follows:

> Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked.
>
> A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.

508 U.S. at 381-82 (Scalia, J., concurring) (quoting J. Moynahan, Police Searching Procedures 7 (1963)).

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Additionally, because the Court of Appeals reached the correct decision in this case, there is in fact no error for the Court to address. As explained *supra*, the plurality explicitly considered, and the concurrence implicitly considered, all of the circumstances surrounding the stop. Pet. App. 66-67, 70-74. First, the plurality considered the fact that the trooper smelled marijuana "emanating from the vehicle." Pet. App. 66. Then, it considered the fact that the trooper's testimony was "devoid" of any description of factors that typically indicate danger, such as a bulge in a pocket or waistband, furtive movements, flight, nervousness, noncompliance with orders, inconsistent or false statements, a known history of violence, or presence in an area known for weapons. *Id*. Next, the plurality considered "the circumstances that it was nighttime at the time of the traffic stop, and that there were three people in the vehicle . . .." Pet. App. 67. With respect to those factors, it recognized that by the time the frisk occurred two other officers had arrived so "the vehicle's occupants no longer outnumbered the law enforcement officers," and it recognized that the trooper "did not testify that those factors caused him to believe that Norman was armed and dangerous." *Id.* The plurality's and concurrence's subsequent conclusion that the trooper did not have reasonable articulable suspicion to believe that Mr. Norman was armed and dangerous, Pet. App. 67, 74, was sound. For that reason too, the State's petition should be denied.

C. The Court should deny the petition for a writ of certiorari because ensuring "the lawful conduct and personal safety of law enforcement officers" is a timeless concern that is adequately addressed by existing case law and because this case involves marijuana, which has been decriminalized or legalized in almost half of the states.

Finally, the State suggests the Court should grant its petition because the "question presented is particularly timely." Pet. 17. In support of that assertion, the State first notes that the "country is currently wrestling with how to ensure both the lawful conduct and the personal safety of law enforcement officers." Pet. 17. Ensuring "the lawful conduct and the personal safety" of officers is certainly a weighty concern that should not be minimized. It is a concern, however, that is adequately addressed by the Court's well-established case law, which permits an officer to frisk a passenger in a lawfully stopped car when the officer has reasonable suspicion to believe the passenger is armed and dangerous and which also permits an officer, if he or she chooses, to remove the driver as well as any passengers from the lawfully stopped car. See *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998) (recognizing that, in the context of a routine traffic stop, permitting officers to order the driver and passengers out of the car and permitting officers to pat down occupants when an officer has reasonable articulable suspicion to believe that an occupant is armed and dangerous allows officers to "protect themselves from danger"). Review in this case, therefore, is unnecessary to ensure officer safety.

Secondarily, the State notes that this case "arises in the context of changing societal norms and legal proscriptions concerning marijuana possession." Pet. 17. Far from making this case a good candidate for certiorari review, however, the changing societal and legal landscape surrounding the use of marijuana militates against granting the State's petition. As a recent case from the Maryland Court of Appeals explains, seven states have "legalized possession of a small amount of marijuana," and fifteen jurisdictions now punish "the first-time possession of a small amount of marijuana" "by a fine and/or participation in an examination, drug education, or drug treatment." *Robinson v. State*, 152 A.3d 661, 663 n.1 (Md. 2017). Presumably, the legislatures in those states took the actions they did because they did not believe that individuals who possess small amounts of marijuana are dangerous. Assuming the Court believes there is any merit to the argument that the suspected possession in a car of heroin, or cocaine, or methamphetamine, or any other illegal drug that is treated consistently across the country, gives rise to reasonable suspicion to believe that passengers in the car are armed and dangerous, the argument has absolutely no merit when the drug at issue is marijuana; thus, review by the Court is not warranted on that ground either.

CONCLUSION

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

Respectfully submitted,

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