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

REPLY BRIEF FOR PETITIONER

BRIAN E. FROSH
Attorney General of Maryland

CARRIE J. WILLIAMS *
DANIEL J. JAWOR
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-7837
cwilliams@oag.state.md.us

Counsel for Petitioner
**Counsel of Record*

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REPLY ARGUMENT

A. The Court should grant certiorari to resolve a conflict between the Fourth Circuit and the Court of Appeals of Maryland.

In an effort to downplay the conflict between the Fourth Circuit and the Court of Appeals of Maryland, Norman strategically focuses his argument on *United States v. Sakyi*, 160 F.3d 164 (4th Cir. 1998), and its supposedly unique facts. Br. in Opp. 2. But, for three reasons, Norman's attempt to attribute the conflict to factual differences falls short.

First, in any case applying a totality-of-the-circumstances test, a litigant can easily point to a supposed fact of distinction between the case under review and a prior precedent. The difficult task is establishing that the supposed fact of distinction is instrumental to the analysis. Norman has not done so with respect to *Sakyi*. It is true that facts not present here were present in *Sakyi*—including that the stop occurred in a high-crime area, that the driver lied about his license status, that Sakyi did not have identification, and that Sakyi wore loose clothing. Pet. 10; Br. in Opp. 6. But the Fourth Circuit never suggested that any of these facts were outcome determinative or even contributed marginally to its ultimate legal holding that

> when the officer has a reasonable suspicion that illegal drugs are in [a lawfully stopped] 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. Unlike many precedents applying a totality-of-the-circumstances test, *Sakyi* expressly identifies its legal rule and the facts essential to it. The supposed facts of distinction marshaled by Norman are not among them.

On this critical point, the brief in opposition contains a damaging tell. Norman champions a supposed criticism leveled by Court of Appeals of Maryland: that *Sakyi* unwisely "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[.]" Br. in Opp. 7 (quoting Pet. App. 55). Norman effectively concedes the State's point. Whether correctly called a legal "presumption" or not, the Fourth Circuit certainly did give dispositive effect to those precise facts to find reasonable suspicion to frisk. Within the same calculus of reasonable suspicion, the Court of Appeals of Maryland contrarily rejected the legal salience of the same facts. That is a rift of legal authority that gives conflicting directives to Maryland's law enforcement officers.

Second, if there were any doubt about the facts the Fourth Circuit found dispositive in *Sakyi*, it was cleared up by the Fourth Circuit's decision in *United States v. Rooks*, 596 F.3d 204 (4th Cir. 2010), which confirms the true rule of *Sakyi* as advanced here by the State. In the words of *Rooks*, *Sakyi* stands for the proposition that "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 (citing *Sakyi*, 160 F.3d at 169). Applying this simple rule, the *Rooks* Court expeditiously reasoned that "[b]ecause [the officer in that case] detected marijuana in the Mercury, he was authorized to conduct a pat-down for weapons." *Id*.

Norman's only response to the rule laid bare in *Rooks* is to say in a footnote that, in his view, *Rooks* did not "faithfully apply" *Sakyi*. Br. in Opp. 11 n.2. He suggests that *Rooks* failed to apply the "the second part" of *Sakyi*'s holding—meaning, that "there must be an 'absence of factors allaying [an officer's] safety concerns[.]'" Br. in Opp. 11 n.2. From this language Norman wrenches a requirement that something more than reasonable suspicion to believe drugs are in the car is required before there is reasonable suspicion to frisk a passenger. Br. in Opp. 5–6. But this language merely recognizes that once reasonable suspicion arises, it may ebb and flow in the course of a stop as an officer learns new facts. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . *and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety*, he is entitled" to conduct a frisk) (emphasis added). The "absence-of-allaying-factors" language in *Sakyi*, far from requiring more facts to constitute reasonable suspicion to frisk, functions rather as a proviso by which extant suspicion to frisk may subsequently subside. In *Sakyi*, however, there were no additional facts to allay

the officer's safety concern that had already arisen from the possible presence of marijuana. The same was true in *Rooks*, and the same is true here. But that is not to deny that reasonable suspicion did arise in the first place in all three cases—at least under the Fourth Circuit's rule.

Third, no federal district court responsible for applying *Sakyi* and *Rooks* shares Norman's strained view that more than a reasonable belief that a car contains illegal drugs is needed before reasonable suspicion to frisk arises. Stated differently, no district court has distinguished *Sakyi* and *Rooks* on the ground that the stop under review did not occur in a high crime area or that the suspect was not wearing loose clothing—which, in all the years since *Sakyi* was decided, one would expect if those facts were, as Norman argues, critical to the Fourth Circuit's rule. To the contrary, in deciding whether an officer had reasonable suspicion to frisk a detained motorist, federal district courts applying *Sakyi* and *Rooks* have looked to whether an officer had reasonable suspicion to believe that the stopped car contained illegal drugs, and if so, the courts have not required anything more.[1]

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[1] *See, e.g., United States v. Kerns*, No. 2:15-CR-00217, 2016 WL 5745117, at *6 (S.D. W. Va. Sept. 30, 2016) ("Trooper Williams' . . . reasonable suspicion to believe Defendants' were engaged in transporting illegal drugs, however, necessitates a finding that the pat-down was reasonable" under *Sakyi*); *United States v. Saul*, No. 3:15-CR-184, 2016 WL 3181135, at *5 (E.D. Va. June 3, 2016) (finding reasonable

For these reasons, Norman cannot credibly contend that a conflict of legal authority does not exist here. In Maryland federal courts, the standard for reasonable suspicion to frisk "may be satisfied by an officer's objectively reasonable suspicion that drugs are present in a vehicle that he lawfully stops." *Sakyi*, 160 F.3d at 169. In Maryland state court, that is decidedly not enough, and some added indicium of dangerousness is required. Pet. App. 4, 64. The Court should intervene in this case to resolve the conflict and provide definitive guidance to Maryland's law

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suspicion to frisk because "officers testified to smelling marijuana" and "[n]umerous courts," including *Sakyi* and *Rooks*, "have confirmed the lawfulness of a limited pat-down search upon the detection of marijuana during a traffic stop"); *Morris v. Saine*, No. 3:11-CV-417-RJC, 2014 WL 4545760, at *4 (W.D.N.C. Sept. 12, 2014) (finding reasonable suspicion to frisk under *Sakyi* and *Rooks* because officer "smelled marijuana immediately upon speaking with" the detained motorist, and that reasonable suspicion was only "heightened" by the motorist's subsequent movements in dipping down to the floorboard); *United States v. Smalls*, No. 2:09-CR-1339-PMD, 2013 WL 267768, at *4 (D.S.C. Jan. 24, 2013) (finding reasonable suspicion to frisk under *Sakyi* because "the officers noticed the smell of marijuana and saw a scale in the vehicle"); *United States v. Coe*, No. 3:11-CR-92-HEH, 2011 WL 2899175, at *8–9 (E.D. Va. July 18, 2011) (finding reasonable suspicion to frisk under *Sakyi* and *Rooks* because "the officers reasonably suspected drug activity inside the vehicle"), *aff'd*, 490 Fed. Appx. 544 (4th Cir. 2012).

enforcement officers who frequently engage in activity that can end up in either federal or state court.

B. The Court should grant certiorari to address whether and under what circumstances probable cause to conduct a *Carroll* search also justifies a frisk of a passenger.

The petition asks the Court to address whether and under what circumstances probable cause to conduct a vehicle search also justifies a frisk of a passenger. Pet. 12. The State advances two theories. First, 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. To establish Fourth Amendment reasonableness, this argument relies on *the fact* of probable cause to search the car and the physical danger that the ensuing *Carroll* search[2] inevitably poses to the officer.

Second, under a traditional totality-of-the-circumstances test for reasonable suspicion, an officer should be able to frisk a car's passenger when, as here, the officer has encountered a group of three people driving at night with quantities of raw marijuana "strong" to the human nose. This type of probable cause affords an objective and particularized basis to believe that a large quantity of saleable drugs is being transported, which belief, in turn, provides an objective and particularized basis to believe that one or all of the occupants might be armed and

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[2] *Carroll v. United States*, 267 U.S. 132 (1925).

dangerous. To establish Fourth Amendment reasonableness, this second argument looks beyond the fact of probable cause to search the car and to *the nature and quality of that probable cause* and the inferences it will support.

Norman argues that the Court should deny the petition because the first argument was not raised below. Br. in Opp. 12–14. But during all appellate stages of this case, Norman has conceded that, upon smelling the strong scent of raw marijuana, Trooper Jon Dancho had probable cause to search the car under *Carroll*, and the question has always been what significance to attach to that probable cause in the calculus of reasonable suspicion to frisk. The State's bright-line rule is not, therefore, a new claim on unique facts, so much as a modified theory in support of an existing claim. The facts that support the State's two theories are one and the same.

And it is not as if the first argument's presentation to this Court inures to Norman's detriment in any way. He had every incentive at the suppression hearing to contest the application of the *Carroll* doctrine, and he in fact did so by cross-examining the prosecution's witnesses and arguing the matter before the motion court. Pet. App. 100. Thus, the State's use of the fact of probable cause, and not merely its qualitative nature, is no reason for this Court not to consider the State's proposed bright-line rule. Indeed, only this Court has the power in the end to say whether such a bright-line rule comports with the Fourth Amendment.

Undertaking what amounts to a preemptive merits argument, Norman also contends that the

State's proposed bright-line rule would be unjustified because, unlike other decisions in which the Court has drawn bright-line rules for traffic stops, this case concerns a frisk, which is "a severe, though brief, intrusion" upon a suspect's personal security. Br. in Opp. 13–14 (quoting *Terry*, 392 U.S. at 24–25). There is no question that a frisk poses more than a "de minimis" intrusion, as was found to be the case with an officer's order to exit a car in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *Maryland v. Wilson*, 519 U.S. 408 (1997). But what the State would endeavor to show in its merits briefing is that the level of intrusion occasioned by a limited pat-down of the outer clothing is justified by the potential danger posed by a detained but typically unrestrained passenger removed from a car to effectuate the car's search. Pet. 13–14. Norman's jumping ahead to a merits argument betrays the value of this Court's review of that question.

C. The Court should grant certiorari because the question presented is particularly timely.

In its petition, the State has argued that changing societal norms and legal proscriptions on possession of small amounts of marijuana afford the Court a timely opportunity to confirm that regardless of these changes, "probable cause to suspect distribution or transportation of larger amounts of marijuana carries with it the reasonable suspicion that the distributor or transporter may be armed." Pet. 17. Norman rejoins that, "[f]ar from making this case a good candidate for certiorari review, . . . the changing societal and legal landscape surrounding the use of

marijuana militates against granting the State's petition." Br. in Opp. 17. This is so, says Norman, because "*[p]resumably*, the legislatures in those states [that have decriminalized or even legalized possession of small amounts of marijuana] took [those] actions . . . because they did not believe that individuals who possess small amounts of marijuana are dangerous." Br. in Opp. 17 (emphasis added). This argument is not persuasive.

First, this case has never been about a small amount of marijuana. Trooper Dancho detected the strong scent of raw marijuana, which indicated that a large quantity of saleable drugs was being transported. *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998) (stating that when "an officer encounters . . . the overpowering smell of raw marijuana, there is a fair probability that the car is being used to transport large quantities of marijuana"). And in the end, police recovered approximately 48.1 grams of marijuana—nearly five times the criminal amount in Maryland.

Second, Norman's argument simply "presumes" away that which the State would have this Court decide: whether changing societal norms and legal proscriptions concerning marijuana possession imply any judgment about what a traffic officer may reasonably fear when confronted with the strong scent of raw marijuana in transit. In essence, the State is asking this Court to decide whether it remains reasonable to infer a connection between drugs and guns under the circumstances of the search activity in this case. Norman cannot forestall this Court's consideration by simply presuming his

preferred conclusion based on data limited to criminal penalties for small time possessors.

CONCLUSION

For these reasons, and those set forth in the State's petition, the Court should issue a writ of certiorari.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

CARRIE J. WILLIAMS *
DANIEL J. JAWOR
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-7837
cwilliams@oag.state.md.us

Counsel for Petitioner
**Counsel of Record*

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