No. 19-814

IN THE

Supreme Court of the United States

TONY DESHAWN MCCOY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The scope of and justification for stop-and-frisk is an area of great concern to the criminal justice system.[1]

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Notice of intent to file was given to both parties 10 days in advance and Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's holding in this matter warrants review for the additional and important reason that that it allows officers to conduct searches for weapons despite the fact that the officers' reasonable suspicion went only to drug use. Blanket rules of reasonable suspicion based upon drug use alone violate this Court's precedent and the Fourth Amendment, which require greater respect for individual liberty from search and seizure. Moreover, as this Court articulated in *Richards v. Wisconsin*, stereotypical inferences about drug use and firearm risk create both "over-generalization" and bootstrapping concerns that would allow the reasonable suspicion requirement to expand so broadly that it would provide no meaningful check on potential Fourth Amendment violations. Finally, the Fourth Circuit's holding denies Petitioner independent appellate review (*i.e.*, without deference to the trial court determination) of ultimate determinations of reasonable suspicion, as this Court requires pursuant to *Ornelas v. United States.*

ARGUMENT

I. BLANKET RULES FOR REASONABLE SUSPICION VIOLATE *TERRY V. OHIO*

Terry v. Ohio, 392 U.S. 1 (1968), resolved what was a hugely complicated issue for its time in a common sense fashion: it stressed respect for the sanctity of the person, *id.* at 17[2] & 26, but it had to reasonably protect the officer in the performance of his duties, *id.* at 27, when he realizes based on his observations in his "experience [show] that criminal activity may be

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[2] Stop-and-frisk "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."

afoot." *Id.* at 30. The power of stop-and-frisk must "be ... narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27. Thus, the "reason to believe" in *Terry* was Officer McFadden's observations and logical inferences that the defendants' walking back and forth in front of the jewelry store which indicated to any reasonable officer they were casing the store to rob it. *Id.* at 30.

The Fourth Circuit recognized its blanket rule long before this case[3] in *United States v. Sakyi,* 160 F.3d 164, 169 (4th Cir. 1998), based on *Pennsylvania v. Mimms,* 434 U.S. 106, 108-09 (1977), and *Maryland v. Wilson,* 519 U.S. 408, 411-12 (1997), that traffic stops are inherently dangerous. "Reasonableness" is determined by weighing the "public interest" against the "individual's right to personal security free from arbitrary interference by law officers." *Mimms,* at 109, quoting *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975). *Sakyi* even cited *Terry* for that even though *Terry* did not involve a traffic stop.

Blanket rules, however, at not "narrowly drawn authority," *Terry,* at 27, and a blanket rules effectively enforce "arbitrary interference by law officers" contrary to *Mimms, Brignoni-Ponce,* and *Terry.*

II. THE FOURTH CIRCUIT'S PRESUMPTION HERE IS CONTRARY TO *RICHARDS V. WISCONSIN*

A blanket rule that weapons are always involved in drug cases was rejected in *Richards v. Wisconsin,* 520 US. 385 (1997) involving knock-and-announce of a hotel room. And, after all, aren't all drug raids "in-

[3] *United States v. McCoy,* 773 Fed. Appx. 164 (4th Cir. 2019).

herently dangerous" to some degree? The state court in *Richards* adopted a per se rule that felony drug cases create a risk of violence because of the possibility of weapons, *id.* at 392. This Court rejected the state's blanket rule as insulating knock-and-announce exceptions from judicial review, *id.* at 392-94, because fact based reasonable suspicion of a weapon was required:

> But creating exceptions to the knock and announce rule based on the "culture" surrounding a general category of criminal behavior presents at least two serious concerns.
>
> First, the exception contains considerable over generalization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree . . . . Wisconsin's blanket rule impermissibly insulates these cases from judicial review.
>
> A second difficulty with permitting a criminal category exception to the knock and announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others . . . . (footnotes omitted).

In knock-and-announce cases, the decision to dispense with announcement for any reason is made prior to the execution or the warrant at the scene but always based on the objective facts known to the officers and evaluated by the reasonable suspicion standard: is the entry for a crime of violence, is the subject of the search already known to be likely armed and dangerous or prone to resist, are there sounds from inside that suggest destruction of evidence? Thus, there can be no blanket rule; there must

be objective facts. *See* 2 Wayne R. LaFave, Search and Seizure § 4.8(e) at 874-76 n. 134 (5th ed. 2012 & October 2019 update) citing 14 cases from the federal circuits and states finding a blanket rule for dispensing with announcement just because a gun might be in the home without actual knowledge of circumstances that a weapon was present and could be used.[4]

And, even the Fourth Circuit ironically agrees. In *Bellotte v. Edwards,* 629 F.3d 415, 423 (4th Cir. 2011), the occupants were known to have concealed carry permits and the search warrant was for child pornography based on a single photograph. A concealed carry permit is a "lawful act" and the state conceded that most people in that state have guns at home (also entirely lawful acts). *Id.*[5] "Here the bare fact that the Bellottes had concealed weapon permits cannot justify this no-knock entry." *Id.* at 424. The tension between *Bellotte* and this case is apparent, and it remains unexplained. Moreover, "There are more guns than people in the United States, according to a new study of global firearm ownership," Christopher Ingraham, Wash. Post, June 19, 2018. (393m v. 326m). And, 43% of Americans are in homes with firearms. Lydia Saad, *What Percentage of Americans Owns Guns?* Gallup, August 14, 2019 https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx. Under the Fourth Circuit's

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[4] A year after *Richards* in *United States v. Ramirez,* 523 U.S. 65, 72-73 (1998), the Court repeated that exigency for dispensing with announcement has to be based on the "existence of circumstances" justifying the exception, quoting *Miller v. United States,* 357 U.S. 301, 309 (1958).

[5] Indeed, there is a Second Amendment right to possess a firearm in one's own home. *District of Columbia v. Heller,* 554 U.S. 570 (2008).

rationale here, if extended to homes, every home in America would be subject to no-knock just because of the 43% likelihood of the presence of firearms. Yet, even the Fourth Circuit court does not follow that rule as to searches of dwellings, only to searches of people in cars in drug cases.

Now, compare the prevalence of firearms to the prevalence of marijuana: Only nine states still have illegal marijuana. Some with still illegal marijuana have decriminalized small amounts, such as North Carolina has here. The rest of the country and the District of Columbia have medical marijuana or full legal use of small quantities. DISA, Map of Marijuana Legality by State, https://disa.com/map-of-marijuana-legality-by-state (visited Jan. 24, 2020). See Pet. Cert. at 14 (Dec. 26, 2019).

The odor of marijuana is apparent in innumerable traffic stops. It could be because the occupants consumed in the car. It could also be because one or more of the occupants lawfully consumed marijuana before getting in the car and the smell is on their person and they might be "nose blind" to it. The Fourth Circuit's blanket rule here isn't even intuitively correct. The smell of consumed marijuana or the presence of a small quantity says not a word about the likelihood of a firearm being present. It simply fails to support a reasonable inference the occupant might be armed. In contrast, the presence of a substantial quantity of drugs does more logically support that inference, as Professor LaFave recognizes, *supra,* at 878, nn. 138-41.

III. THE BLANKET RULE HERE VIOLATES *ORNELAS V. UNITED STATES* REQUIRING "INDEPENDENT APPELLATE REVIEW OF THESE ULTIMATE DETERMINATIONS OF REASONABLE SUSUPICION

The Fourth Circuit's rule here also denies "independent appellate review of these ultimate determinations of reasonable suspicion" required by *Ornelas v. United States,* 517 U.S. 690, 697 (1996):

> We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination. *See, e.g., Brinegar, supra* (rejecting District Court's conclusion that the police lacked probable cause); *Alabama v. White,* 496 U.S. 325 (1990) (conducting independent review and finding reasonable suspicion). A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Brinegar,* supra, at 171. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

Ornelas is applicable to any exception to the "totality of circumstances" determination of reasonable suspicion. *United States v. Arvizu,* 534 U.S. 266, 273-74 (2002) (and citing *Ornelas*).

CONCLUSION

Blanket rules of reasonable suspicion simply have no place in the Fourth Amendment. The Fourth Circuit's blanket rule violates *Terry v. Ohio, Richards v. Wisconsin,* and *Ornelas v. United States.*

The Petition for Certiorari presents an important question on the scope of stop-and-frisk, the greatest exception to the Fourth Amendment's warrant requirement, and it should be granted.

Respectfully submitted,

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