ORIGINAL

No. 19-7171

Supreme Court of the United States

SAMUEL TURNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Samuel Turner
Petitioner
13254-047
P.O. Box 725
Edgefield, SC 29824

QUESTIONS PRESENTED

At approximately 11:30 p.m. on 8-9-17, a dispatcher alerted Lincoln Police Department ("LPD") Officer Christopher Monico to a possible disturbance by a named suspect near the trailer court where Petitioner Samuel Turner lived. This was the third time police had come to this area on this complaint against the named suspect. Each time, for some reason, they had decided to question Mr. Turner. As Monico drove through Mr. Turner's trailer court looking for a suspect, Monico observed a woman standing next to a cluster of mailboxes & stopped to talk to her. The woman was Kimberlie Bridges, an acquaintance of Mr. Turner's & the mother of his child. Officer Craig Price arrived on the scene shortly thereafter to serve as backup. While Monico & Price were talking to Bridges, they saw Mr. Turner walking up to them from some distance away. During the entire time that Mr. Turner approached, Officer Monico shined a flashlight on Mr. Turner and in his eyes. When Mr. Turner was close enough, Monico asked him about the reported disturbance. Mr. Turner asked Monico to lower the flashlight because it was in his face. As Monico did so, he saw that, after voluntarily approaching police, Mr. Turner had somehow stopped with one foot partially on top of what looked like a bag containing a quantity of powder that had been left on the ground somehow by someone. There was no indication he had himself dropped the bag on the ground because the officers observed him the entire time he was walking up to them. And, anyway, since he voluntarily approached police, why would he have waited until he got close to put the bag on the ground?. Mr. Turner was immediately arrested and charged with the methamphetamine found in the bag. Prior to trial, counsel for Mr. Turner moved for a *Subpoena Duces Tecum* asking for "investigative reports & materials prepared by the [LPD]" about "calls" officers made to his "home at the time of his arrest," "calls" they made at his home over "the two days prior" to his arrest, & "calls" they made "to

[his] trailer court or [the] immediately surrounding area." Mr. Turner specifically alleged that the reports would provide "exculpatory evidence" because they would show that he had not been trafficking drugs & that someone else may have dropped the bag of methamphetamine. The *Subpoena Duces Tecum* was denied. Mr. Turner proceeded to a jury trial, was convicted & sentence to 360 months incarceration.

1.) Whether, the lower courts erred by upholding the arrest of Mr. Turner?

2.) Whether the lower courts erred in denying and upholding the denial of the *Subpoena Duces Tecum* for the critically important information?

2.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate his conviction and sentence?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

More specifically, the Petitioner Samuel Turner and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Samuel Turner, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on 8-16-19.

OPINIONS BELOW

The 8-16-19 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 934 F.3d 794; 2019 U.S. App. LEXIS 24491, and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 9-30-19. This opinion is an unpublished decision reported at 2019 U.S. App. LEXIS 29464, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the District of Nebraska, was entered on 5-18-18, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior Report & Recommendations of the Magistrate Judge for the United States District Court for the District of Nebraska recommending denial of Mr. Turner's motion to suppress, was entered on 1-12-18, is an unpublished decision reported at 2018 U.S. Dist. LEXIS 5649 *; 2018 WL 400760 and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the District of Nebraska adopting the Magistrate Judge Report and Recommendation and denying Mr. Turner's motion to suppress was entered on 2-7-18, is an unpublished decision reported at 2018 U.S. Dist. LEXIS 20023 and is reprinted in the separate Appendix E to this Petition.

The prior opinion and judgment of the United States District Court for the District of Nebraska denying Mr. Turner's motion for a Subpoena Duces Tecum was entered on 1-12-18, is an unpublished decision, and is reprinted in the separate Appendix F to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 8-16-19. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 9-30-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

U.S.S.G. § 4B1.1 provides, *inter alia*, as follows:

> §4B1.1. Career Offender
>
> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
>
> (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.
> Offense Statutory Maximum Offense Level*
>
> (1) Life 37

Id.

U.S.S.G. § 4A1.2(p) (2016) provides, *inter alia*, as follows:

> (p) Crime of Violence Defined

For the purposes of § 4A1.1(f), the definition of "crime of violence" is that set forth in § 4B1.2(a).

Id.

U.S.S.G. § 4B1.2(a) (2016) provides, *inter alia*, as follows:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Id.

Nebraska Statute R.R.S. Neb. § 28-323 provides as follows:

§ 28-323. Domestic assault; penalties.

(1) A person commits the offense of domestic assault in the third degree if he or she:

(a) Intentionally and knowingly causes bodily injury to his or her intimate partner;

(b) Threatens an intimate partner with imminent bodily injury; or

(c) Threatens an intimate partner in a menacing manner.

(2) A person commits the offense of domestic assault in the second degree if he or she intentionally and knowingly causes bodily injury to his or her intimate partner with a dangerous instrument.

(3) A person commits the offense of domestic assault in the first degree if he or she intentionally and knowingly causes serious bodily injury to his or her intimate partner.

(4) Violation of subdivision (1)(a) or (b) of this section is a Class I misdemeanor, except that for any subsequent violation of subdivision (1)(a) or (b) of this section, any person so offending is guilty of a Class IIIA felony.

(5) Violation of subdivision (1)(c) of this section is a Class I misdemeanor.

(6) Violation of subsection (2) of this section is a Class IIIA felony, except that for any second or subsequent violation of such subsection, any person so offending is guilty of a Class IIA felony.

(7) Violation of subsection (3) of this section is a Class IIA felony, except that for any second or subsequent violation under such subsection, any person so offending is guilty of a Class II felony.

(8) For purposes of this section, intimate partner means a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship. For purposes of this subsection, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.

Id. (As amended effective 2015)

Fed. R. Crim. P. 17 provides as follows:

Rule 17. Subpoena

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service.

(1) In the United States. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) In a Foreign Country. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) Issuing a Deposition Subpoena.

(1) Issuance. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) Place. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.
Notes

Id. (As amended Apr. 23, 2008, eff. Dec. 1, 2008.)

STATEMENT OF THE CASE

On or about 10-17-17 Samuel Turner was charged with violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B) (Possession with Intent to Distribute "5 Grams or More of Methamphetamine Actual") (Count 1).

These charges arose from police' alleged 'discovery' that Mr. Turner had stopped with his foot on a small baggy of methamphetamine by a set of mailboxes in his trailer park after he had voluntarily walked up to the police from some distance away while they were questioning his lady friend, Kimberly Bridges, by the mailboxes while the police were searching for someone else who had created 'a disturbance' in a neighboring trailer park. There was no indication he had himself dropped the bag on the ground because the officers observed him the entire time he was walking up to them. Police subsequently found another smaller baggie with methamphetamine on the ground. Both Mr. Turner and Ms Bridges were immediately arrested based on their proximity to the methamphetamine. While Mr. Turner's case proceeded to federal court, Bridges' case was inexplicably dismissed with prejudice.

He was arraigned on or about 11-15-17 at which time he pleaded not guilty to the charged violations.

On 12-15-17, counsel filed a motion to suppress. On 1-16-18, a hearing was held on the motion to suppress. On 1-16-18, a Magistrate Report & Recommendation was issued recommending denial of the motion to suppress.

On 2-7-18, the District Court denied the motion to suppress. In denying the motion to suppress, the District Court held, *inter alia*, that police "had a right to detain Turner when they found what looked like a bag of methamphetamine under his foot". *United States v. Turner*, 934 F.3d 794; 2019 U.S. App. LEXIS 24491 ** (8th Cir. 8-16-19) (Appendix A)

On or about 11-20-17 the government filed an "information" alleging that Mr. Turner had been previously convicted of a Drug Trafficking Crime. This information was filed ostensibly pursuant to 21 U.S.C. § 851.

On 12-21-17, counsel for Mr. Turner filed a motion for issuance of a *Subpoena Duces Tecum* asking for:

> 1. The investigative reports and materials prepared by Lincoln Police Department on their state prosecution of Defendant's co-defendant Kimberly E. Bridges contain investigative work on Defendant's case that (1) may not have been disclosed to the federal prosecutors; (2) and may contain exculpatory evidence in favor of the Defendant;
>
> 2. Said information would be admissible for impeachment purposes of witnesses, as well as provide witnesses whose attendance at trial may require subpoena.
>
> 3. Said subpoena has been fashioned in a manner to seek only information conducted on the investigatory work of the Lincoln Police Department as to the Defendant and co-defendant Kimberly E. Bridges. Said subpoena would not be a burden for production upon the Lincoln Police Department since the case against Ms. Bridges has since been dismissed, and said materials are now discoverable materials both civilly as well as criminally.

(Motion for *Subpoena Duces Tecum* 12-21-17) (USDC Docket 4:17-cr-03121-RGK, Entry #26)

Counsel for Mr. Turner added,

> At the outset of Defendant's arrest, both he and his co-defendant Kimberlie Bridges were cited with methamphetamine related possession charges. However, Ms. Bridges was only charged with simple possession of a controlled substance regarding the smaller baggie. Because both the large and small baggies were in similar proximity to both Ms. Bridges and Defendant, under the prosecution's possession theory in this case Ms. Bridges could have been charged with possession with intent to distribute. She was not, however, charged with such a crime, and eventually her charges were dismissed with prejudice and Ms. Bridges paying the court costs therein.
>
> Because of the disparity between the prosecution of these cases and the near exact theories of possession for both the Defendant and Ms. Bridges, it is highly likely that any documentation in possession of the Lincoln Police Department contains exculpatory evidence for the Defendant. Her case was found to have contained probable cause by the Lancaster County Court, yet it was immediately dismissed by the prosecution prior to any discovery motions or receipt of any police reports by Ms. Bridges in the Lancaster County District Court.

> There is no other way than subpoena to obtain these evidentiary materials, and counsel has contacted the prosecution and they object to issuance of a subpoena regarding these reports. Simply stated, because the facts against these parties are the same, there is a reason the charges were dismissed against Ms. Bridges, and that information is in the possession of the Lincoln Police Department.
>
> **Conclusion**
>
> Because of the nearly identical possession theories presented regarding the Defendant and his co-defendant Ms. Bridges, their exists, with more likelihood than not, exculpatory evidence within the Lincoln Police Department investigative reports regarding the Defendant. While the evidence collected in this case was completely through the efforts of the Lincoln Police Department, their production of these documents will not be a burden to them, and will more than likely provide exculpatory evidence regarding Defendant.

(Memorandum in Support of Motion for *Subpoena Duces Tecum* 12-21-17) (USDC Docket 4:17-cr-03121-RGK, Entry # 27)

On 1-12-18, the District Court denied the motion for *Subpoena Duces Tecum* as follows:

> Defendant has failed to show anything other than a "mere hope" that the LPD investigative file of Kimberly E. Bridges will provide evidence relevant to Defendant's case. And the need for evidence to impeach witnesses is generally insufficient to support a Rule 17(c) subpoena for document production in advance of trial. United States v. Nixon, 418 U.S. 683, 701 (1974); Hardy, 224 F.3d at 755. As such, Defendant has failed to make the requisite showing for issuance of a Rule 17(c) subpoena for the LPD investigative file of Kimberly E. Bridges. His motion for leave to serve the proposed subpoena will be denied.

(USDC Docket 4:17-cr-03121-RGK, Entry #35) (Appendix F)

On or about 2-20-18 Mr. Turner proceeded to trial. (Appendix B) At trial, the evidence of Mr. Turner's proximity to the methamphetamine was material and central to the evidence presented by the government against him. Due to the denial of the motion for a *Subpoena Duces Tecum*, Mr. Turner was unable to utilize the exculpatory police reports of their investigation of himself and his lady friend.

On 2-23-18, Mr. Turner was found guilty by the jury as to violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B) (Possession with Intent to Distribute "5 Grams or More of Methamphetamine Actual") (Count 1).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 37 and a Criminal History of VI which resulted in a guideline sentencing range 360 months to life with a statutory mandatory minimum of 10 years. (Presentence Report, ¶¶ 131-132) This guideline sentencing range was, in turn, predicated on a "Career Offender" enhancement ostensibly pursuant to U.S.S.G. § 4B1.1 (2016) and U.S.S.G. § 4A1.2(p) (2016), and U.S.S.G. § 4B1.2(a) (2016) based on a prior state conviction in 2008 for "Attempted Domestic Assault" under R.R.S. Neb. § 28-323 from a Total Offense Level of 26 and a Criminal History of III with an unenhanced guideline sentencing range of 78-97 months incarceration. (Presentence Report, ¶¶31, 70-71)

On 5-17-18, Mr. Turner appeared for sentencing. At sentencing, the Court adopted the recommendations of the Presentence Report, made a notation that it had examined Mr. Turner's 2008 Nebraska State conviction for Attempted Domestic Assault under R.R.S. Neb. § 28-323 and found it to be a "Crime of Violence", made a cursory reference to the 18 U.S.C. § 3553(a) factors and sentenced Mr. Turner to 360 months incarceration. (Transcript of sentencing 5-17-18).

On 5-17-18, Mr. Turner was sentenced to 360 months plus 8 years supervised release for violations of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B) (Possession with Intent to Distribute "5 Grams or More of Methamphetamine Actual") (Count 1). This sentence represented enhancement under the Career Offender Guideline Sentencing Range primarily due to the determination that Mr. Turner's 2008 Nebraska State conviction for Attempted Domestic

Assault under R.R.S. Neb. § 28-323 was held to be a "Crime of Violence". (Transcript of sentencing 5-17-18, page 9) (Appendix B)

The judgment was entered on 5-18-18.

On 5-18-18, a Notice of Appeal was filed. On direct appeal, counsel argued:

> 1. Mr. Turner's motion to suppress should have been granted by the district court because the arresting officers lacked reasonable suspicion for the detention, questioning, and subsequent arrest of Mr. Turner;
>
> 2. The district court should have granted Mr. Turner's subpoena of Lincoln Police Department records because they would have shown exculpatory evidence of numerous contacts with Mr. Turner prior to his detention and arrest on August 9, 2016;
>
> 3. The verdict of the jury was not supported by the evidence proffered by the United States at trial and Mr. Turner's motion for acquittal should have been granted because the jury could only have found Mr. Turner not guilty based upon the evidence;
>
> 4. The district court erred in allowing in text messages and photos which were not authenticated, lacked foundation, were hearsay, and were not relevant to the prosecution of Mr. Turner.

(Turner USCA Brief, PDF page 2)

On 8-16-19, the Court of Appeals denied Mr. Turner's appeal.

Counsel timely filed a petition for rehearing. On 9-30-19, the Court of Appeals denied rehearing. (Appendix C)

Mr. Turner demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT MR. TURNER'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States,* 318 U.S. 332 (1943).[1] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies

[1] See also *GACA v. United States,* 411 U.S. 618 (1973); *United States v. Jacobs,* 429 U.S. 909 (1976); *Rea v. United States,* 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens,* 375 U.S. 162 (1963); *Elkins v. United States,* 364 U.S. 206 (1960)..

> the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

1A.) The Lower Courts Erred By Upholding The arrest Of Mr. Turner

Probable cause to arrest a person exists if the law enforcement official, on the basis of the totality of the circumstances, has sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing that an offense has been or is being committed by the person to be arrested. While probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity, mere suspicion is not enough. *United States v. Valentine*, 539 F.3d 88, 95 (2d Cir. 2008) (Conduct involving presence at scene of attempted controlled delivery and suspicious actions could not have generated anything more than a generalized suspicion that he was involved in criminal conduct. Such suspicions do not create probable cause to arrest) (citing *Wong Sun v. United States*, 371 U.S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) ("It is basic that an arrest . . . must stand upon firmer ground than mere suspicion.") and *United States v. Ingrao*, 897 F.2d 860, 863-65 (7th Cir. 1990) (finding no probable cause where a suspect carried an opaque bag down a gangway previously used by a narcotics suspect, looked around while crossing the street, and then drove carefully away while frequently looking in his rearview mirror)); *United States v. Soza*, 686 F. App'x 564, 567 (10th Cir. 2017) (Facts that defendant matched a general description of the unidentified burglar and that he was in close proximity in time and place to the burglary did not constitute "probable cause" to arrest him.); *Ybarra v. Illinois*, 444 U.S. 85, 87, 100 S. Ct. 338, 340 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with

respect to that person."); *Williams v. City of Chi.*, 733 F.3d 749, 752 (7th Cir. 2013) (Clearly physical proximity to a suspected crime, without other indicia of involvement, is insufficient to support a finding of probable cause. It is a "well-settled proposition" that mere proximity to suspected criminal activity does not, without more, generate probable cause. A mere suspicion of illegal activity at a particular place is not enough to transfer that suspicion to anyone who leaves that property."). *Cf. United States v. Esquivel-Ortega*, 484 F.3d 1221 (9th Cir. 2007) (insufficient evidence defendant aware of drugs in vehicle in which he was riding); *United States v. Catching*, 2019 U.S. App. LEXIS 26552; 2019 FED App. 0463N (6th Cir. 2019) (insufficient evidence defendant aware of drugs in vehicle he was driving); *United States v. Perez-Melendez*, 599 F.3d 31 (1st Cir. 2010) (same).

In the instant case, the evidence used to arrest Mr. Turner arose from police' alleged 'discovery' that Mr. Turner had stopped with his foot on a small baggy of methamphetamine by a set of mailboxes in his trailer park after he had voluntarily walked up to the police from some distance away while they were questioning his lady friend, Kimberly Bridges, by the mailboxes while the police were searching for someone else who had created 'a disturbance' in a neighboring trailer park. There was no indication he had himself dropped the bag on the ground because the officers observed him the entire time he was walking up to them. Police subsequently found another smaller baggie with methamphetamine on the ground. Both Mr. Turner and Ms Bridges were immediately arrested based on their proximity to the methamphetamine.

This 'evidence' was clearly insufficient to establish "probable cause" for his arrest under the cases cited above.

1B.) The Lower Courts Erred In Denying And Upholding The Denial Of The *Subpoena Duces Tecum* For The Critically Important Information

Fed. R. Crim. P. 17(c) provides as follows:

> (c) Producing Documents and Objects.
>
> (1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>
> (2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.
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> (3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

Id.

Although Fed. R. Crim. P. 17(c) provides only that the court may quash a subpoena if compliance would be unreasonable or oppressive, the U.S. Supreme Court adopted the four-part test set forth in United States v. lozia for determining when a Rule 17(c) subpoena can be used. The Court summarized this test as (1) relevancy; (2) admissibility; (3) specificity. Fed. R. Crim. P. 17(c) states only that a court may quash a subpoena if compliance would be unreasonable or oppressive. The judicial gloss that the material, sought must be relevant, admissible, and specific applies where the government issues a subpoena or where a defendant issues a subpoena to the government. Nixon makes clear that this standard also applies where the government subpoenas a non-party. But the standard is inappropriate where production is requested by (A) a criminal defendant; (B) on the eve of trial; (C) from a non-party; (D) where the defendant has an

articulable suspicion that the documents may be material to his defense. A defendant in such a situation need only show that the request is (1) reasonable, construed as material to the defense, and (2) not unduly oppressive for the producing party to respond. *United States v. Tucker*, 249 F.R.D. 58; 2008 U.S. Dist. LEXIS 11374 ** (SD NY 2008) (discovery granted for records of phone calls by cooperating witnesses because they "could be material to his defense, and ... production would not be unreasonably onerous to the Bureau of Prisons"); *In re Grand Jury Subpoena etc.*, 520 F. Supp. 253, 255 (S.D. Tex. 1981) (documents need to be "generally relevant");

In the instant case, as set forth above, on 12-21-17, counsel for Mr. Turner filed a motion for issuance of a *Subpoena Duces Tecum* asking for:

> 1. The investigative reports and materials prepared by Lincoln Police Department on their state prosecution of Defendant's co-defendant Kimberly E. Bridges contain investigative work on Defendant's case that (1) may not have been disclosed to the federal prosecutors; (2) and may contain exculpatory evidence in favor of the Defendant;
>
> 2. Said information would be admissible for impeachment purposes of witnesses, as well as provide witnesses whose attendance at trial may require subpoena.
>
> 3. Said subpoena has been fashioned in a manner to seek only information conducted on the investigatory work of the Lincoln Police Department as to the Defendant and co-defendant Kimberly E. Bridges. Said subpoena would not be a burden for production upon the Lincoln Police Department since the case against Ms. Bridges has since been dismissed, and said materials are now discoverable materials both civilly as well as criminally.

(Motion for *Subpoena Duces Tecum* 12-21-17) (USDC Docket 4:17-cr-03121-RGK, Entry #26)

Counsel for Mr. Turner added,

> At the outset of Defendant's arrest, both he and his co-defendant Kimberlie Bridges were cited with methamphetamine related possession charges. However, Ms. Bridges was only charged with simple possession of a controlled substance regarding the smaller baggie. Because both the large and small baggies were in similar proximity to both Ms. Bridges and Defendant, under the prosecution's possession theory in this case Ms. Bridges could have been charged with possession with intent to distribute. She was not, however, charged with such

a crime, and eventually her charges were dismissed with prejudice and Ms. Bridges paying the court costs therein.

Because of the disparity between the prosecution of these cases and the near exact theories of possession for both the Defendant and Ms. Bridges, it is highly likely that any documentation in possession of the Lincoln Police Department contains exculpatory evidence for the Defendant. Her case was found to have contained probable cause by the Lancaster County Court, yet it was immediately dismissed by the prosecution prior to any discovery motions or receipt of any police reports by Ms. Bridges in the Lancaster County District Court.

There is no other way than subpoena to obtain these evidentiary materials, and counsel has contacted the prosecution and they object to issuance of a subpoena regarding these reports. Simply stated, because the facts against these parties are the same, there is a reason the charges were dismissed against Ms. Bridges, and that information is in the possession of the Lincoln Police Department.

Conclusion

Because of the nearly identical possession theories presented regarding the Defendant and his co-defendant Ms. Bridges, their exists, with more likelihood than not, exculpatory evidence within the Lincoln Police Department investigative reports regarding the Defendant. While the evidence collected in this case was completely through the efforts of the Lincoln Police Department, their production of these documents will not be a burden to them, and will more than likely provide exculpatory evidence regarding Defendant.

(Memorandum in Support of Motion for *Subpoena Duces Tecum* 12-21-17) (USDC Docket 4:17-cr-03121-RGK, Entry # 27)

On 1-12-18, the District Court denied the motion for *Subpoena Duces Tecum* as follows:

> Defendant has failed to show anything other than a "mere hope" that the LPD investigative file of Kimberly E. Bridges will provide evidence relevant to Defendant's case. And the need for evidence to impeach witnesses is generally insufficient to support a Rule 17(c) subpoena for document production in advance of trial. United States v. Nixon, 418 U.S. 683, 701 (1974); Hardy, 224 F.3d at 755. As such, Defendant has failed to make the requisite showing for issuance of a Rule 17(c) subpoena for the LPD investigative file of Kimberly E. Bridges. His motion for leave to serve the proposed subpoena will be denied.

(USDC Docket 4:17-cr-03121-RGK, Entry #35) (Appendix F)

The District Court erred in denying the motion and the Court of Appeals erred in affirming the motion. *Id.*

1C.) Multiple Errors In The Courts Below Mandate That Mr. Turner's Conviction And/Or Sentence Be Vacated.

The "Career Offender" enhancement to Mr. Turner's sentence to 360 months incarceration ostensibly pursuant to U.S.S.G § 4B1.1 (2016) and U.S.S.G. § 4A1.2(p) (2016), and U.S.S.G § 4B1.2(a) (2016) based on a prior state conviction in 2008 for "Attempted Domestic Assault" under R.R.S. Neb. § 28-323 from a Total Offense Level of 26 and a Criminal History of III with an unenhanced guideline sentencing range of 78-97 months incarceration, was unlawful because it did NOT establish that Mr. Turner and the victim were in a current "intimate relationship" at the time of the events. The facts alleged actually established exactly the opposite; i.e. that they had terminated any intimate relationship. (See PSI ¶67) *State v. Gay*, 18 Neb. App. 163; 778 N.W.2d 494; 2009 Neb. App. LEXIS 206 *** (NE Court of Appeals 2009); *Villanueva v. City of Scottsbluff*, 2014 U.S. Dist. LEXIS 27349 * (D NE 2014). Consequently Mr. Turner's Career Offender enhancement vacated and he should be resentenced to a maximum of 78-97 months incarceration. *Id.*

Further Grounds

Mr. Turner's conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Turner's conviction and sentence are violative of his right to freedom of speech and to petition and his right to be free of unreasonable search and seizure, his right to due process of law, his rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and his right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Mr. Turner's sentence.

First Step Act

Mr. Turner is entitled to retroactive application of the First Step Act, 115 P.L. 391; 132 Stat. 5194; 2018 Enacted S. 756; 115 Enacted S. 756 (12-21-2018) as hereinafter more fully appears.

Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with (1) longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal when the law changes and (2) the text and remedial purpose of the Act. To the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

Preliminarily, "a presumption of retroactivity" "is applied to the repeal of punishments." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring). "[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* (quoting *Yeaton v. United States, 5 Cranch* 281, 283 (1809)). The common law principle that repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute's repeal and re-enactment with different penalties and "even when the penalty [is] reduced." *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

This Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review). *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 (1974). The Court expressly anchored its holding in *Bradley* on the

principle that an appellate court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice" or there is "clear legislative direction to the contrary." Id., 711, 715. It explained that this principle originated with Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801): "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." Id., 712 (quoting *Schooner Peggy*, 1 Cranch at 110). Moreover, a change in the law occurring while a case is pending on appeal is to be given effect "even where the intervening law does not explicitly recite that it is to be applied to pending cases...." *Bradley*, 416 U.S. at 715.

Since Mr. Turner's judgment was not yet "final" on 12-21-18 when the First Step Act was enacted, he is entitled to retroactive application of all relevant portions of the Act. *Id.*

These claims in Argument 1C are submitted to preserve Mr. Turner's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

Based on the foregoing, the decision by the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Eighth Circuit in Mr. Turner's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Samuel Turner respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits. **VACATE** the order affirming his direct appeal and **REMAND**[2] to the court of appeals for reconsideration in light of the cases cited herein.

Samuel Turner
Petitioner
13254-047
P.O. Box 725
Edgefield, SC 29824

Date: _____

[2] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).