No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

FATOU SMALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN S. MALIK
100 East 14th Street
Wilmington, Delaware 19801-3255
302-427-2247
Counsel of Record for the Petitioner,
Fatou Small

Dated: June 4, 2020

QUESTION PRESENTED FOR REVIEW

Whether a vehicle stop was performed in violation of Petitioner's Fourth Amendment rights when no observable traffic offense was committed by Petitioner and, absent a traffic offense, the totality of the circumstances failed to corroborate an informant's tip to establish reasonable suspicion justifying the stop?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

Other Authorities:

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Petitioner Fatou Small prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on January 6, 2020 in United States of America vs. Fatou Small, No. 19-1344, and appearing at A153-161.

OPINION BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit was dated January 6, 2020. The Third Circuit Court docket number for the subject matter was Number 19-1344. A copy of the Third Circuit Court Memorandum Opinion and Judgment Order is attached hereto at pages A153 through A161 of the Appendix.

Furthermore, a copy of the relevant written opinion of the United States District Court for the District of Delaware are attached hereto at pages A10 through A17 of the Appendix.

JURISDICTION OF THE COURT

The United States Court of Appeals for the Third Circuit issued its Judgment Order on January 6, 2020 affirming Petitioner's convictions. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(2).

The United States District Court for the District of Delaware, had subject matter jurisdiction of the instant case pursuant to 21 U.S.C. §§ 841(a)(l), (b)(l)(A), and (b)(1)(B), 846, and 18 U.S.C. § 2. The United States Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 in that the subject case was appealed from an Order of Judgment in a Criminal Case of the district court entered on January 6, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

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.

STATEMENT OF THE CASE

STATEMENT OF FACTS

A. Introduction.

On March 7, 2017, at 4:17 P.M., Dover Police Officers Boesenberg and Richey and Delaware Probation Officer Porter were conducting a "routine patrol" in the area of Bacon Avenue in Dover, Delaware when they observed a black Lincoln Town Car parked in the driveway of 805 Bacon Avenue. (A59-60).[1] The windows of the car were down and the officers were able to observe that it was occupied by a passenger sitting in the front passenger seat. (A60). It appeared as if the vehicle might have been about to depart since the engine was running. (A84-85,118).

Probation Officer Porter knew that the address of 805 Bacon Avenue and the Lincoln Town Car belonged to Petitioner Fatou Small based upon "previous dealings" with Mr. Small and information from a confidential informant, ("CI"). (A110,114-115). Officer Boesenberg requested that other Dover Police Department Officers establish surveillance on Mr. Small's residence at 805 Bacon Avenue and the Lincoln Town Car. (A63).

B. The September 8, 2016 curfew check.

In September of 2016, a full 6 months before the March 7, 2017 vehicle stop, Officer Boesenberg indicated that a CI had identified Mr. Small via a photograph and advised that he was a large supplier of Ecstasy in the Dover area and that he obtained Ecstasy from New Jersey. (A58). Officer Boesenberg provided no information from the CI regarding Mr. Small's alleged activities after September of 2016; did not indicate that there were ever any observations of Mr. Small made by law enforcement officers that

[1] "A" signifies the page reference to the Appendix.

corroborated the CI's September of 2016 allegations; and, did not state that the CI had a history of past proven reliability as of September of 2016.[2] (A79-81).

On September 8, 2016, Officer Boesenberg and Probation Officer Porter conducted a curfew check on Mr. Small at 805 Bacon Avenue. (A56-58; TS16-18). The officers observed a male exiting the residence who they attempted to contact. (A57). The male avoided the officers and fled in a vehicle at a high rate of speed. (A57,112). He eventually was apprehended after a motor vehicle collision and a foot chase. (A57,113). The fleeing male was not Mr. Small. (A75).

Officer Porter returned to 805 Bacon Avenue and observed the Town Car in the driveway. (A58). He knocked on the door; but, there was no answer although he allegedly heard a male voice inside the home. (A113). After this incident, Probation Officer Porter obtained an administrative search warrant for 805 Bacon Avenue based upon alleged missed curfew checks by Mr. Small and information from a CI that Mr. Small was selling drugs from the residence. (A116-117). This administrative search warrant was never executed. (A126-127). Furthermore, Probation Officer Porter and the Dover Police Officers never sought or obtained a formal search warrant for 805 Bacon Avenue or an arrest warrant for Mr. Small's person based on probable cause or violations of his conditions of probation. (A126).

C. The March 2017 vehicle stop – the "cracked windshield".

Returning to the events of March 7, 2017, after observing the Town Car running in the driveway with a person in the front passenger seat, Officer Boesenberg and

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[2] Officer Boesenberg testified that is was not until some time after September of 2016 that the CI provided information that was confirmed to be accurate and reliable. (A80-81).

Probation Officer Porter continued past 805 Bacon Avenue. (A62-63). They turned onto Nimitz Road and waited to determine if the Lincoln Town Car was going to leave 805 Bacon Avenue. (A63,119). Several minutes later, Officer Boesenberg saw the Lincoln proceeding southbound on Nimitz Road before additional surveillance officers had arrived. (A119). Officer Boesenberg's patrol car passed the Lincoln that was being driven by Mr. Small. (A64). Allegedly, Officer Boesenberg, Probation Officer Porter, and Dover Police Officer Richey observed what they described as a severely broken or cracked windshield on Mr. Small's Lincoln Town Car. (A12,64-65,67,120-121).

A dash camera from Officer Boesenberg's patrol car captured video footage of the patrol vehicle passing Mr. Small's Town Car on Nimitz Road. (A67). The video shows that it took only four seconds for the patrol car and the Town Car to pass and does not indicate that the Town Car had an observable cracked or broken windshield. (A69,88-89). Officer Boesenberg testified that the "severely" cracked or broken windshield on the Town Car constituted a motor vehicle violation and provided reasonable suspicion and probable cause for the warrantless stop of Mr. Small's vehicle. (A66-67,132,137). Officer Boesenberg admitted that the hairline crack in the Town Car's windshield was barely visible when the car was stationary. (A71,95,135). Consequently, it would not have been visible to an observer passing the moving vehicle in the opposite direction in a matter of mere seconds. Other than the stale events that had occurred in September of 2016, the officers did not observe anything on March 7, 2017 that indicated that a crime had been committed, was being committed, or was about to be committed when they saw the Town Car in the driveway.

After the car stop, Mr. Small and his vehicle were searched. (A12). From

information developed during the stop, Probation Officer Porter obtained an administrative search warrant for Small's home. (A12). During a search of the house, Ecstasy pills and a firearm were found. (A12,28).

D. The suppression hearing.

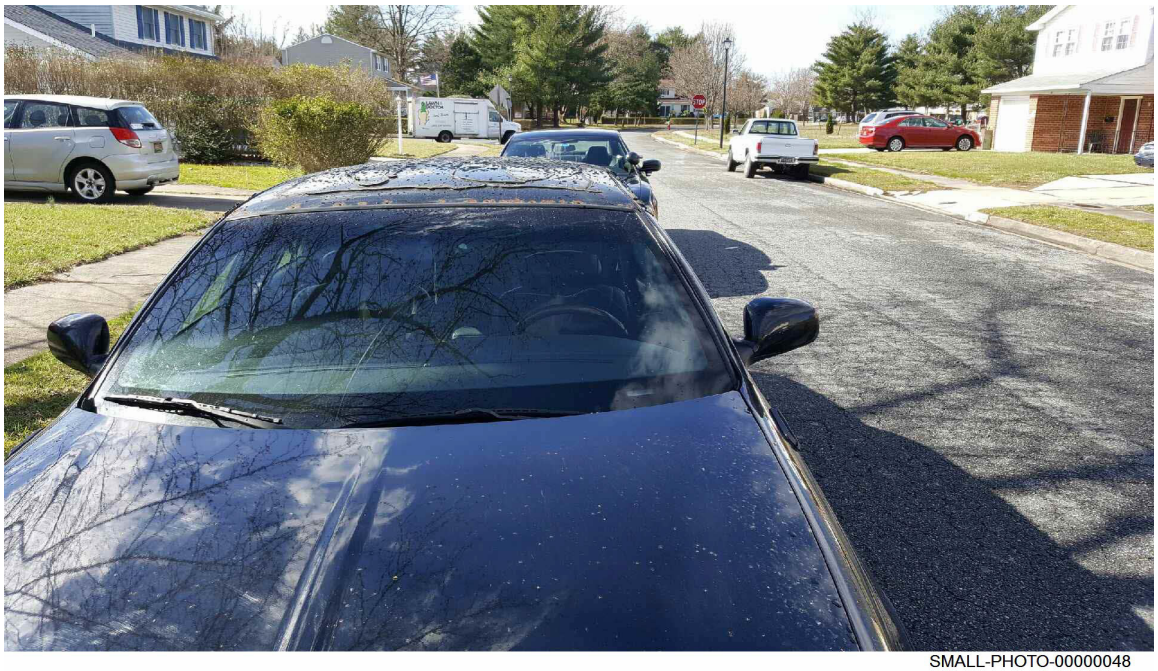
At the January 3, 2018 suppression hearing, the district court judge summarized the sole issue as follows:

> My understanding is there is a fruit of the poisonous tree argument but it seemed to me not disputed between the parties that if the stop was supported under the law, then the suppression motion should be denied in full whereas if the stop is not supported by the law and the suppression motion should be granted in full. Is that not the case?

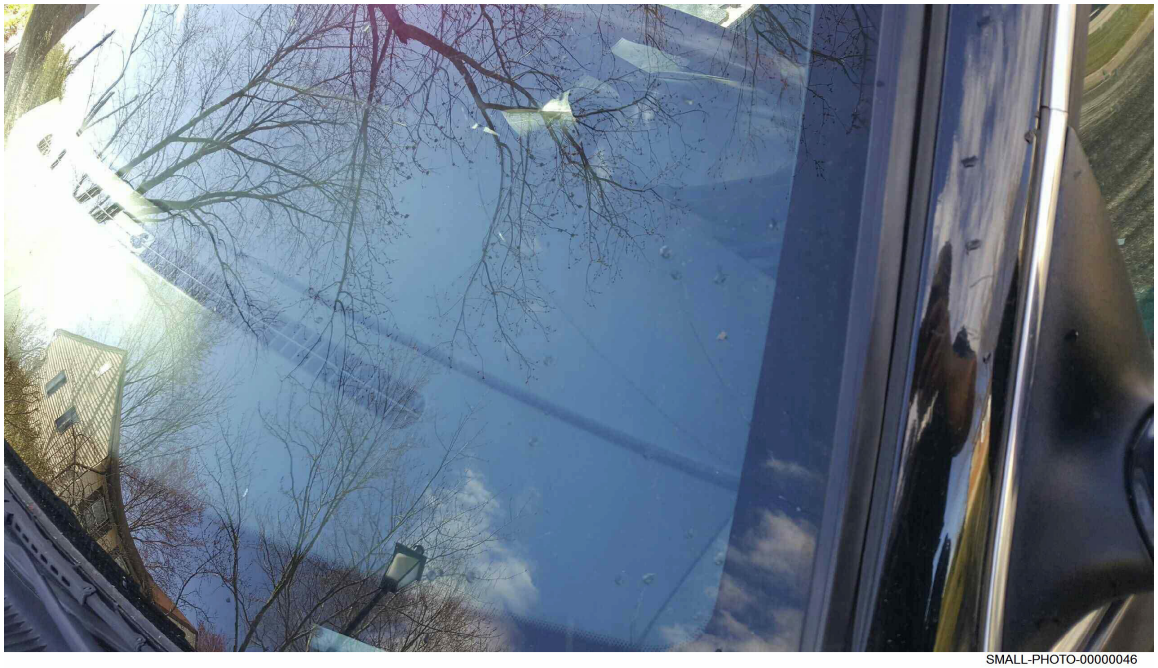
(A53). Both the government and the defense agreed with the district court's assessment. (A53-54).

The issue before the district court was whether the prosecution had established that a hairline crack in the windshield of Petitioner's Town Car, which is not visible in video footage from the arresting officers' patrol vehicle and which is not visible in high resolution photographs taken of the Town Car after the stop, was capable of being observed by the officers as they passed the Town Car in their patrol vehicle.

The following are high resolution, digital photographs taken of the front of Petitioner Small's car and windshield shortly after the vehicle stop.



SMALL-PHOTO-00000048



SMALL-PHOTO-00000046

(A143-144). The hairline crack in the windshield is not visible in these photographs.

The next photograph was taken from the rear of the Town Car. (A145). The hairline crack is barely visible in this photograph.

As previously indicated, the arresting officers claimed to have been able to observe the hairline crack in the windshield of the moving Town Car. (A64-65,67,120-121). However, the video and the photos appearing above clearly demonstrate that it would not have been possible for a person to detect the hairline crack from a moving police car in only four seconds. Additionally, the officers failed to provide any logical explanation as to how it would have been possible for them to have observed the windshield's hairline crack prior to the vehicle stop. Their testimony was also inconsistent.

i. The testimony of Officer Boesenberg.

At the suppression hearing, Officer Boesenberg testified that while passing Petitioner's Town Car in the opposite direction on Nimitz Road in Dover, he allegedly observed that the front windshield was cracked. (A64). He claimed that after seeing the crack, he stated to the other officers in his patrol vehicle that the windshield was cracked and the other officers "advised [him] verbally the same thing." (A65,105). He related

that he recognized the driver as Petitioner Small and upon doing so began to turn around to pursue the Town Car while having a conversation with the other officers that the driver was Mr. Small. (A65-66). Officer Boesenberg further described the hairline crack in the windshield as "…clearly visible, enough to cause a safety issue. Something that can be seen. It doesn't look very sturdy." (A66).

The government presented a video taken from the dash camera of Officer Boesenberg's patrol vehicle as it passed the Town Car.[3] Officer Boesenberg candidly admitted that the hairline crack in the windshield was ***not*** visible in the video. (A69). Additionally, he testified that unless one knew where the hairline crack was, it was "***impossible***" to see in the high resolution, digital photograph of the windshield he had taken from the front of the Town Car after the traffic stop. (A71,143-144). Despite the fact that the crack was not visible in the video or still photographs, Boesenberg persisted in his claim that he was somehow able to observe the crack in the few seconds that the windshield was visible to him as the patrol car and Town Car passed each other.

When attempting to explain how he was able to see the hairline crack from his moving patrol car, Officer Boesenberg suggested that he was able to see it as the Town Car drove past him since "…the lighting was different. **It was a glare, it was glaring off of this crack and stood out.**" (A72). [Emphasis added.] He claimed that the hairline crack "**stuck out like a sore thumb** on Nimitz Road when [he] saw it." (A90). [Emphasis added.] He stated, "I just know the lighting was different enough for me to 100 percent see the windshield was cracked when I drove by on Nimitz Road." (A91).

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[3] The video from the dash camera of Officer Boesenberg's vehicle was admitted as Government's Exhibit 2 at the January 3, 2018 Suppression Hearing. (A67).

On cross examination, the sun glare issue brought up by Officer Boesenberg was explored further. Specifically, Officer Boesenberg was asked to explain what exactly it was about the sun glare that allegedly made the hairline crack visible to him on Nimitz Road although the crack was not visible in the video or even in the high resolution photographs. (A100). The officer stated:

> The glare, sunlight to a mirror, you are going to get a glare. You are going to get more shine off it. Sunlight hitting that windshield at that time of day. The angle was in the glare.

(A100).

The officer next was asked to review the video footage of the Town Car passing the police patrol car and to pay particular attention to the sun in the upper left hand corner of the video appearing behind the Town Car as it approached and passed the patrol car. (A100-101). After viewing the video, including the sun in the upper left corner behind the Town Car as it passed the patrol vehicle, Boesenberg testified, "I'm not going to say it wasn't the sun."[4] (A103). When asked if he was able to see any glare shining or reflecting off the windshield when the Town Car passed him, he answered, "On the video? No, I couldn't…." (A103; TS63). Upon being asked for clarification if he saw something reflecting off the windshield of the Town Car, he replied, "No, no. No, no. I saw the crack. The video doesn't show up on that crack.'' (A103-104). Finally, when questioned again if the alleged sun glare made the crack stand out as the Town Car passed him, Officer Boesenberg stated, "It had to have. You can't -- I mean just looking

[4] During his testimony at the suppression hearing, Probation Officer Porter testified that the bright object seen behind the Town Car as it passed the patrol car in the upper left corner of the video appeared to be the sun. (A134).

at Exhibit, Government Exhibit 3 -- you can't see the crack as well as I saw it that day."[5] (A104).

Officer Boesenberg also confirmed that although he allegedly was able to identify Mr. Small as the driver, he was unable to identify whether the front seat passenger was a male or female. (A107).

According to Officer Boesenberg, the sole basis for the vehicular stop of Mr. Small's Town Car was the cracked windshield. (A65-66). He further testified that, as the officers waited for Mr. Small to leave his home at 805 Bacon Avenue, there was no "game plan" to stop him. (A86-87). As will be established later, Officer Boesenberg's testimony differs markedly from that of his cohort, Probation Officer Porter, regarding the "game plan" on March 7, 2017 for stopping Mr. Small.

ii. <u>The testimony of Probation Officer Porter</u>.

At the suppression hearing, Probation Officer Porter initially testified that as the Town Car passed the patrol car, he observed: (1) a "broken windshield"; (2) Mr. Small operating the Town Car; and, (3) a black female passenger in the front seat. (A120). He stated that he had a "conversation" with the other officers in the patrol car "immediately as [the Town Car] passed." (A120). He claimed that everyone in the patrol car said in unison, "…that's Fatou Small driving, and we all agreed that is a broken windshield." (A121,136). When asked if he recalled which of the three officers first observed the

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[5] The significance regarding the position of the sun in the upper left corner of the video ***<u>behind</u>*** the approaching Town Car was that it would ***<u>not</u>*** have been possible for the sun to produce a glare or reflection on the front windshield of the Town Car when the sun was positioned behind or in back of the Town Car and was not shining or reflecting on the windshield. In light of the position of the sun in the video, Boesenberg's testimony that sun glare accentuated the hairline crack simply does not make sense.

crack, Porter said, "I don't, but it was so simultaneous that everyone I think just stated aloud there is a cracked windshield." (A136).

Porter described the windshield as "severely damaged" and indicated that the hairline crack "obstructed the vision of the driver." (A132). He reiterated that he first saw the hairline crack as the Town Car was passing the patrol car.[6] (A132). After seeing the crack, he identified Mr. Small as the driver.[7] (A132).

However, Porter later changed his initial testimony and claimed that he first saw the hairline crack as soon as the Town Car turned from Bacon Avenue onto Nimitz Road when it was less than 50 meters from the patrol car.[8] (A139). This necessarily would have been before all three officers supposedly observed the crack as they passed the

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[6] See the following excerpt from Probation Officer Porter's testimony:

> Q: And at what point did your see the crack in the windshield?
>
> A: **I saw it as it was passing us.** I'm not sure if I identified Mr. Small first, but I could see the crack clearly, and then I positively identified Mr. Small.

(A132). [Emphasis added.]

[7] Ironically, although Officer Porter claimed that the "severely damaged" windshield "obstructed the vision of the driver", it seemingly did not obstruct his or the other officers' abilities to identify Petitioner Small as the driver of the moving Town Car.

[8] See the following excerpt from Probation Officer Porter's testimony:

> Q: You say you could see the defendant's vehicle as it turned from Bacon onto Nimitz; correct?
>
> A: Yes.
>
> * * *
>
> Q: When did you first see that there was a crack in the windshield?
>
> A: **As the vehicle is approaching, I could see the crack.** It's a very short distance. **So probably right after the vehicle made the turn** and he is approaching us, so the vehicle is probably, I don't know, less than 50 meters away I could see.

(A139). [Emphasis added.]

Town Car and allegedly stated in unison that they saw a cracked windshield. (A65,105,133,136). When asked what made the hairline crack stand out that enabled him to see it, Porter simply replied, "It was a large crack." (A133-134). He mentioned nothing about sun glare purportedly accentuating the crack in stark contrast to what Officer Boesenberg had claimed.

As mentioned earlier, Probation Officer Porter's testimony differed significantly from that of Officer Boesenberg regarding the "game plan" for Petitioner Small on March 7, 2017. Officer Boesenberg testified that there was no "game plan" for Mr. Small on the date in question. (A86-87). Conversely, Porter stated that there was a "game plan" and it was to stop Mr. Small's as soon as the officers positively identified him in the Town Car. (A140). Porter unequivocally confirmed his "game plan" and his intention to stop Mr. Small regardless of any traffic violation during the suppression hearing under the following direct questioning by the District Court Judge:

> THE COURT: Now, you say you had developed a plan some time after September 2016 to try to confront the defendant somewhere away from his residence; is that correct?
>
> THE WITNESS: That's correct.
>
> THE COURT: So on March 7th, 2017, was it still your plan to confront the defendant at some point when he is away from his residence?
>
> THE WITNESS: That is correct, Your Honor.
>
> THE COURT: So once you had positively identified him as being in this vehicle, were you, consistent with your plan, going to confront the defendant?
>
> THE WITNESS: We were, yes.
>
> THE COURT: **And so does that mean you were**

> **going to pull over his vehicle as soon as you recognize that he was in that vehicle?**
>
> THE WITNESS: **Exactly. Once we positively identified him, we would have stopped him.** However, it was a traffic violation, so the officer attended to that first.
>
> THE COURT: **But you were going to pull him over either way?**
>
> THE WITNESS: **Yes**, Your Honor.

(A139-140). [Emphasis added.]

E. The District Court's ruling denying Petitioner's suppression motion.

Notwithstanding that the hairline crack in the Town Car's windshield was not visible in the dash cam video or in the digital photographs taken of the front of the parked Town Car, and notwithstanding that the officers failed to provide a plausible explanation as to how they were able to see the hairline crack from their moving patrol car, the district court accepted at face value the officers' testimony that they somehow were able see the crack. (A14). The District Court found the officers' testimony to be credible citing that their testimonies were consistent with written reports they had drafted at some time after the traffic stop. (A16). The District Court concluded that the officers had observed "specific, articulable facts to justify a belief that Small was committing a traffic infraction." (A16). On these grounds, Petitioner Small's suppression motion was denied.

In reaching its conclusion, the District Court failed to reconcile substantial inconsistencies in the testimony of the officers that included conflicts in testimony concerning the timing of the officers' alleged simultaneous observations of the crack; the position of the sun behind the Town Car as it passed the police vehicle; the impossibility of sun glare making the crack more visible; the lack of any reasonable explanation why

the crack was allegedly visible to the officers, but not on the video or photographs; contradictory testimony concerning the "game plan" for stopping Mr. Small; and, prior cases in which Officer Boesenberg's testimony was rejected as being implausible and not supported by the video evidence from the dash camera of his patrol car.

Petitioner Small submits that when all facts adduced at the suppression hearing are considered, the record does not support a conclusion that the officers reasonably were able to observe the hairline crack in the moving Town Car's windshield from their moving patrol vehicle or that reasonable suspicion existed to justify the vehicle stop and subsequent search of Petitioner's vehicle and residence. As a consequence, the stop of Petitioner's vehicle and the subsequent searches were conducted in violation of Petitioner's rights under the Fourth Amendment.

F. <u>The Circuit Court's ruling affirming the denial of the suppression motion</u>.

The District Court's decision denying Petitioner suppression motion was affirmed on appeal by the Circuit Court. (A153-161). The Circuit Court agreed with Petitioner that the officers' claims of being able to observe the hairline crack in the windshield of the Town Car "…does not square with the photographs taken of his windshield later that day." (A158). The Circuit Court also found that the alleged windshield crack was not "…visible in the video footage of the traffic stop." (A158). However, the Circuit Court affirmed on alternative grounds not cited by the District Court. (A158).

Specifically, the Circuit Court ruled that the officers had reasonable and articulable suspicion to conduct a stop of Petitioner's vehicle based upon tips from a reliable informant that Petitioner Smalls used his black Town Car to traffic Ecstasy. (A158). Furthermore, the appellate court held that the informant's tip was "partially"

corroborated when Probation Officer Porter saw a black Town Car parked in Petitioner's driveway during the September of 2016 probation curfew check, researched the vehicle's registration, and confirmed that the car was owned by Petitioner Small. (A159). The Third Circuit Court concluded that these factors coupled with Petitioner's prior drug conviction and active probationer status provided the officers with reasonable suspicion that he used the Town Car to transport drugs. (A159). As soon as the officers saw Petitioner Small operating the Town Car, they had reason to suspect a crime and could search both his car and home without a warrant given his probation status. (A160-161).

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THERE WAS NO OBJECTIVE JUSTIFICATION FOR THE STOP OF PETITIONER'S CAR FOR A WINDSHIELD CRACK THAT WAS NOT VISIBLE IN PHOTOS AND VIDEO SINCE THE OFFICERS FAILED TO PROVIDE A PLAUSIBLE EXPLANATION HOW THEY WERE ABLE TO DETECT THE HAIRLINE CRACK FROM THEIR MOVING PATROL CAR.

A. The standard and scope of review.

The applicable standard and scope of review of a district court's denial of a defendant's suppression motion based on a finding of reasonable suspicion or probable cause is de novo.[9] "…[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."[10] An appellate court should review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by lower court judges and local law enforcement officers.[11] However, independent review of reasonable suspicion and probable cause is necessary so that appellate courts are able to control and clarify legal principles.[12] Where a relevant legal principle can be given meaning only by being applied to the specific facts of a case, "…the Court has been reluctant to give the trier of fact's conclusions presumptive force

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[9] Ornelas v. United States, 517 U.S. 690, 699, 118 S.Ct. 1657, 134 L.Ed.2nd 911 (1996).

[10] Id.

[11] Id.

[12] Id. at 697.

and, in so doing, strip a federal appellate court of its primary function as an expositor of law."[13]

B. Argument.

1. The applicable law.

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. A traffic stop is considered a seizure for purposes of the Fourth Amendment.[14] A traffic stop is deemed to be a reasonable seizure when "…an **objective review** of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop."[15] [Emphasis added.] To justify a traffic stop, a police officer must "…produce facts establishing that she reasonably believed that a violation had taken place."[16] Reasonable articulable suspicion necessary for a lawful traffic stop requires a showing of considerably less than a preponderance of the evidence.[17] It requires "only a 'minimal level of objective justification'".[18] However, law enforcement officers have the initial burden of providing objective, "specific, articulable facts" to establish reasonable suspicion that an individual has committed a traffic offense.[19]

In most instances, in order for a seizure to be deemed reasonable under the Fourth

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13 Id. at 697, citing Miller v. Fenton, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

14 Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); and, United States v. Johnson, 592 F.3d 442, 447 (3rd Cir. 2010).

15 United States v. Delfin-Colina, 464 F.3d 392, 398 (3rd Cir. 2006).

16 Id.

17 Id. at 396.

18 Id., quoting United States v. Sokolow, 490 U.S. 1,7 (1989).

19 Id.

Amendment, it must be authorized by a warrant based upon probable cause.[20] However, an exception to the warrant requirement allows a law enforcement officer to "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot."[21] A reasonable, articulable suspicion must be supported by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."[22]

2. The record failed to establish reasonable suspicion or probable cause to stop Petitioner's car for a cracked windshield.

Although there are instances where warrantless traffic stops and searches of probationers' residences pass constitutional muster, this was not the case here. The initial stop of Mr. Small's Town Car precipitated the events that culminated in the search of his residence. However, there was no reasonable suspicion or probable cause upon which to base a warrantless traffic stop of Mr. Small's vehicle since the objective evidence presented at the suppression hearing failed to establish that the hairline crack in the windshield of Mr. Small's Town Car was visible, let alone capable of being seen from a moving police car.

The only observation made by Detective Boesenberg and Probation Officer Porter upon initially passing Mr. Small's home at 805 Bacon Avenue was a Lincoln Town Car with its windows down, its motor running, lawfully parked in the driveway, and occupied by a front seat passenger. (A59-60; TS20-21). The officers did not indicate that they

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20 United States v. Robertson, 305 F.3d 164, 167 (3rd Cir. 2002).

21 United States v. Lewis, 672 F.3d 232, 237 (3rd Cir. 2012).

22 Johnson v. Campbell, 332 F.3d 199, 205 (3rd Cir. 2003), citing Terry v. Ohio, 392 U.S. 1, 21 (1968).

were able to see a crack in the car's windshield at this point. These observations failed to suggest that criminal activity was afoot with respect to Mr. Small and that he had committed, was committing, or was about to commit a crime. Consequently, there was no justification for a traffic stop of Mr. Small's vehicle or a detention of his person based on these facts.

The officers related that after passing 805 Bacon Avenue, they positioned their patrol vehicle some distance away and waited to ascertain whether the Town Car would leave the driveway of the residence. (A63,119). The Town Car eventually left the driveway and while both the Town Car and the officers' patrol car were in motion, they passed each other in a matter of four seconds. (A64,67). During this fleeting passing of the two cars, the officers claim to have been able to detect the hairline crack in the windshield of the Town Car that is only barely visible upon close scrutiny of a high resolution photograph of the windshield taken from behind the Town Car.[23] In close-up photographs of the windshield taken of the front of the Town Car, the hairline crack is virtually invisible. (A143-144). The photographs of the hairline crack prove that it was not something that could have been detectable by occupants of a passing car with both vehicles in motion.

It was only after Officer Boesenberg conducted the traffic stop that the officers obtained additional information that led to the search of Mr. Small's car and the administrative search of his home. (A12). This new information was the product of a warrantless traffic stop not supported by reasonable suspicion or probable cause.

[23] The passing of the two vehicles was captured in video obtained from the MVR in Officer Boesenberg's patrol car. This video footage shows that the hairline crack in the Town Car's windshield was not visible or detectable as the cars passed each other.

Therefore, it constituted "fruit of the poisonous tree"[24] and should not have been considered in determining whether a reasonable basis existed for the warrantless administrative search of Mr. Small's residence.

When considering what the officers knew prior to the warrantless traffic stop of Mr. Small's Town Car, there was an insufficient factual basis to support a finding that there were reasonable grounds that Mr. Small possessed contraband on his person or in his home. The information regarding allegations of possession and distribution of Ecstasy dated back to September of 2016, was 6 months old, and was stale. There was no time frame provided for the conclusory and non-specific information alleged by the informant and there were no observations by the officers corroborating the informant's claims concerning Mr. Small possessing or selling Ecstasy. Absent the information obtained following the warrantless traffic stop, there was no justification for the authorization of an administrative search of Mr. Small's residence. Accordingly, the district court erred in denying Appellant Small's suppression motion. All evidence seized following the illegal stop of the Town Car as well as all evidence seized from 805 Bacon Avenue during the administrative search following the illegal vehicle stop should have been suppressed.

3. The irreconcilable conflicts in the officers' testimony.

The basis for the officers' stop of Mr. Small's vehicle was their alleged observation from their moving patrol car of a hairline windshield crack not visible in dash camera video footage or in photographs of the parked Town Car. Consequently, the credibility of the officers' claims of having been able to have seen the crack in the

[24] Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

windshield prior to the stop of the Town Car must be assessed. In conducting this assessment, the following inconsistencies cannot be ignored:

- Officer Boesenberg's testimony and Probation Officer Porter's initial testimony that all three officers first observed the hairline crack simultaneously and announced their observations in unison when passing the Town Car on Bacon Avenue, (A65,105,120,121), and Probation Officer Porter's subsequent testimony that he initially observed the hairline crack when the Town Car had turned from Nimitz Road onto Bacon Avenue approximately 50 meters before it passed the patrol car. (A139).

- Officer Boesenberg's testimony that sun glare reflecting from the Town Car's windshield accentuated the crack and made it visible to him when the dash cam video footage proved that the sun was positioned behind the Town Car and was not reflecting on its windshield. (A72,100,103,104).

- Probation Officer Porter's agreement that the sun was positioned behind the Town Car as it approached and passed the patrol vehicle. (A134).

- The absence from Probation Officer Porter's testimony of any mention of sun glare causing the hairline crack in the windshield to be visible. (A109-140).

- Probation Officer Porter's explanation of being able to observe the hairline crack simply because, "It was a large crack." (A133-134).

- Officer Boesenberg's testimony that there was no "game plan" for Mr. Small on the date in question, (A86-87), that contradicted Probation Officer Porter's testimony that the "game plan" was to stop Mr. Small as soon as he was away from his home whether or not there was a traffic violation. (A140).

- The rejection by Delaware Superior Court Judges of Officer Boesenberg's prior purported observations that he claimed justified vehicle stops in two Delaware state court cases that occurred in the year preceding the instant case.[25]

The officers stopped Mr. Small's car based on a crack in its windshield that they allegedly observed prior to the actual vehicle stop. Although the officers claimed to have been able to see the windshield's hairline crack from their moving patrol car, other objective evidence developed at the suppression hearing suggests otherwise. The crack is not visible in the dash camera video footage as the patrol car passed the Town Car. The crack is not visible in the photographs taken of the windshield from the front of the Town Car. (A143-144). The above listed contradictory testimony of the officers concerning when they first observed the crack and what enabled them to see it favors a conclusion that the actual initial observation of the crack occurred after the Town Car was stopped. All objective evidence in the case at bar refutes the officers' claims that they were able to see the crack prior to the stop of the Town Car. As a consequence, their testimony that they observed the crack prior to the car stop must be rejected given the lack of any objective evidence supporting their claim.

4. The rejection of Officer Boesenberg's testimony in vehicle stop cases by the Delaware Superior Court.

Since an assessment of the credibility of the officers' claims regarding their ability to see the crack in the Town Car's windshield before the car was stopped is

[25] See State of Delaware v. Marshall Rivers, 2016 WL 1644629 (Del.Super. 2016); and, State of Delaware v. Courtney Benson, ID No. 1605002486, Clark, J. (Del.Super. October 25, 2016), a copy of which is attached as Exhibit "A", that are discussed in the next section of Argument in this brief.

essential in the subject case, two relatively recent Delaware Superior Court cases are noteworthy.

In State of Delaware v. Marshall Rivers[26], the Delaware Superior Court granted defendant's suppression motion rejecting Officer Boesenberg's alleged observations after stopping a pickup truck for failing to stop for a stop sign. While on patrol, Officer Boesenberg, who was accompanied by Probation Officer Porter, stopped a Chevrolet pickup truck for the traffic violation. After the stop, Officer Boesenberg approached the pickup from behind on the driver's side with a flashlight at 10:00 P.M. in poor lighting conditions. He testified that he saw Defendant Rivers in the passenger seat placing his hands near his waist area. He further stated that he observed Rivers place his hand in his left front outside jacket pocket and claimed that he was able to observe what appeared to be heroin bundled in blue wax paper packets inside the jacket pocket. Boesenberg removed Rivers from the pickup truck at which time the contents of the left front outside jacket pocket were no longer visible.[27]

Officer Boesenberg then checked the left front outside pocket of River's jacket and did not find any heroin. A pat down search led to the discovery of packages that felt like heroin in the liner of Rivers' jacket. Boesenberg testified that further investigation revealed a hole in the left front outside jacket pocket through which the heroin may have been pushed to hide the heroin in the jacket liner. However, Rivers' jacket was not seized as evidence at the time of the vehicle stop.[28] At the suppression hearing, defense counsel produced a jacket that Rivers had given to him that Rivers indicated he had been

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[26] 2016 WL 1644629 (Del.Super. 2016), at *1.

[27] Id.

[28] Id.

wearing on the night of the traffic stop. This jacket did not have a hole in the left front outside pocket, but instead had a hole in the inside left breast pocket. Boesenberg had testifed at the suppression hearing that he could not see the inside left breast pocket when he approached the pick-up truck.[29]

The State argued that Officer Boesenberg had probable cause to believe a crime had been committed because he allegedly had observed clear plastic bags containing blue wax paper inside Rivers' left front jacket pocket as he approached the full-sized truck at 10:00 P.M. in the evening.[30] In rejecting the prosecution's argument and granting the defendant's suppression motion, the Delaware Superior Court Judge stated the following regarding the claim that Officer Boesenberg was able to see the heroin in Rivers' jacket pocket:

> Based strictly on the facts as presented, **the Court is not convinced that an officer would be able to identify bundled blue wax paper packets in a clear plastic bag in a passenger's jacket pocket when approaching a full size pickup truck from behind on the driver's side in poor lighting conditions**. Although the Court finds it **implausible** that an officer could identify bundled packets of heroin under these conditions, it does not find it impossible. However, in this instance, more facts were needed to carry the argument.

Id. at 7. [Emphasis added.]

In the case of State of Delaware v. Courtney Benson[31], the Delaware Superior Court again rejected the testimony of Officer Boesenberg and granted a suppression

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[29] Id. at *1-*2.

[30] Id. at *3.

[31] A copy of the transcript of the bench ruling in State of Delaware v. Courtney Benson, ID No. 1605002486, Clark, J. (Del.Super. October 25, 2016), is attached hereto as Exhibit "A".

motion that challenged the alleged reasonable suspicion warranting the stop of a vehicle for a traffic violation. In similar fashion to the instant case, the evidence offered at the suppression hearing in the Benson case included the testimony of Officer Boesenberg, dash camera video footage from his patrol vehicle, and a map of the streets traveled by the defendant's car prior to the vehicle stop.[32]

The sole basis for the vehicle stop in the Benson case was an alleged equipment violation, specifically, an insufficient registration plate light in violation of 21 Del.C. § 4334(c). Officer Boesenberg testified that the wiring for the registration plate light was loose and was not illuminating the vehicle's license plate.[33] The Delaware Superior Court Judge reviewed the video footage from the dash camera in Officer Boesenberg's patrol car and found that the license plate was illuminated at the required distance of 50 feet when the patrol car was directly behind the defendant's vehicle. Boesenberg explained that the vehicle's tag appeared illuminated due to the lights of his patrol vehicle shining on the reflective license plate.[34] However, the Court also observed a portion of the video that showed the defendant's vehicle executing a left turn and moving out of the direction of the lights of Boesenberg's patrol car. While the car was not in the path of the patrol car's lights, the video still showed a fully lit license plate and the Court concluded that Boesenberg's patrol car lights were not contributing to the illumination of the defendant's vehicle tag.[35] Additionally, prior to the final stop of the defendant's car, the Court noted that the tag light once again remaining fully illuminated when out of the "line of sight of

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[32] Id. at 2-3.

[33] Id. at 3.

[34] Id. at 4.

[35] Id.

the patrol vehicle's headlights."[36] In rejecting Officer Boesenberg's testimony and granting the defendant's suppression motion, the Delaware Superior Court Judge stated:

> Under the circumstances of this case, when considering the evidence available and presented at the evidentiary hearing, **the Court cannot find by a preponderance of the evidence that the State met its burden to show reasonable articulable suspicion that the defendant's stop was justified by a license plate light violation.**[37]

[Emphasis added.]

Both the Rivers case and the Benson case involved Officer Boesenberg and factual scenarios where the Delaware Superior Court rejected his sworn testimony and ruled that the evidence adduced at the respective suppression hearings did not support a finding that probable cause or reasonable suspicion existed to justify a search of Rivers' jacket or the stop of Benson's vehicle for an equipment violation based on Boesenberg's alleged observations. In both cases, the Delaware Superior Court Judges diplomatically did not expressly opine on the detective's lack of credibility. The Judges simply assessed the objective evidence presented at the suppression hearings and concluded that it did not establish probable cause for the search of a person or reasonable suspicion for a vehicle stop based on an equipment violation.

Appellant Small contends that this Honorable Court should act similarly in the instant case and conclude that the district court erred in denying Appellant's suppression motion since the government failed to establish that the hairline crack in the windshield was detectable by the officers in the patrol vehicle as it passed Mr. Small's Town Car in

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[36] Id. at 5.

[37] Id.

the span of 4 seconds. Drawing on the express language used in the Rivers case, while it may not have been impossible to detect the hairline crack in the windshield of the moving Town Car from the officers' patrol vehicle, it certainly was implausible based on the video, still photographs, and suppression hearing testimony.

E. Summary.

Although there are instances where warrantless traffic stops and subsequent searches of probationers' residences pass constitutional muster, this was not the case here. The illegal stop of Mr. Small's Town Car precipitated the events that culminated in the search of his residence. However, there was no reasonable suspicion or probable cause upon which to base a warrantless traffic stop of Mr. Small's vehicle.

In light of what the officers knew prior to the warrantless traffic stop of Mr. Small's vehicle, there was an insufficient factual basis to support a finding that there were reasonable grounds that Mr. Small had committed, was committing, or was about to commit a traffic violation or any crime. Without the information obtained following the warrantless traffic stop, there was no justification for the authorization of an administrative search of Mr. Small's residence.

For these reasons, the district court erred in denying Appellant Small's suppression motion. This Court must reverse the May 2, 2018 decision of the district court and remand this case with instructions that all evidence seized from Appellant Small, his Town Car, and 805 Bacon Avenue following the illegal vehicle stop must be suppressed from use as evidence at trial as fruit of the poisonous tree.

ARGUMENT II

SINCE THE INFORMANT'S TIP WAS NOT SUFFICIENTLY CORROBORATED, THE TOTALITY OF THE CIRCUMSTANCES FAILED TO ESTABLISH REASONABLE SUSPICION FOR THE STOP OF PETITIONER'S VEHICLE, WHICH VIOLATED THE FOURTH AMENDMENT.

In reviewing the legality of the March 7, 2017 vehicle stop of Petitioner Small's Town Car, this Court must consider the "totality of the circumstances" surrounding the stop and determine whether reasonable suspicion existed to justify this intrusion on Small's Fourth Amendment rights.[38] In the case at bar, the totality of the circumstances failed to establish that reasonable suspicion existed for the vehicle stop. Consequently, all evidence seized after the illegal stop of the Honda was done in violation of Mr. Small's Fourth Amendment rights.

In the instant case, Petitioner Small was on active probation at the time of his arrest. (A110). In September of 2016, six months prior to the March 7, 2017 vehicle stop, probation officers had gone to Petitioner's home for a curfew check and Mr. Small did not answer the door. (A56-58,112-113). Despite the failed curfew check and an informant's tip that Ms. Small sold Ecstasy that he transported from New York to his residence in his black Town Car, probation officers never executed an administrative probation search of Mr. Small's residence. (A116-117,126-127). Other than observing Petitioner's Town Car parked in the driveway of his home, law enforcement officers did nothing to corroborate the informant's tip.

When information provided by an informant is a factor in determining the existence of probable cause, a court must consider the informant's veracity and basis of knowledge.[39] Once an informant has established veracity and a reliable basis of knowledge, then any tips provided are considered in light of the totality of the

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[38] Illinois vs. Gates, 462 U.S. 213, 230 (1983).

[39] Alabama vs. White, 496 U.S. 325, 328 (1990).

surrounding circumstances.[40] Any determination of probable cause necessitates some showing of facts from which an inference may be drawn that an informant is credible and that his information was obtained in a reliable fashion.[41]

It is submitted that the March 7, 2017 stop of the vehicle Petitioner Small was driving violated the Fourth Amendment since it was not supported by specific facts from which a reasonable inference could be drawn that Small was engaged in criminal activity at the time of the stop.[42] When Officer Boesenberg stopped Mr. Small's Town Car for the alleged "severely cracked" windshield, the confidential informant's tip had not been corroborated in a reliable way. The only corroboration of the tip was that the black Town Car was seen parked in the driveway of Mr. Small's residence and was determined to be registered to Mr. Small. (A113-114). The circumstances of the informant's tip, the confirmation that Mr. Small owned the Town Car, and Mr. Small's probationer status and prior drug conviction were insufficient to establish reasonable suspicion that he had committed, was committing, or was about to commit a crime. Thus, the stop of his vehicle was not supported by reasonable suspicion. For example, before the March 7, 2017 vehicle stop, Mr. Small only had two failed probation curfew checks in the prior ten months. (A111-113). Additionally, the informant's tip did not provide any timeframe as to when Mr. Small allegedly transported Ecstasy pills from New York to his home in Dover, Delaware in his Town Car or when he last sold Ecstasy pills in Delaware. (A114). The fact that the informant failed to provide any information concerning the timeframe of Mr. Small's alleged drug activity should have caused a reasonable person to question the informant's veracity.[43]

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[40] Id.

[41] Gates, supra at 462 U.S. 273.

[42] Id.

[43] See Alabama vs. White, supra at 496 U.S. 328, stressing the importance of an officer's ability to corroborate significant aspects of an informant's tip and the informant's ability to predict future events.

The facts upon which the stop of Small's vehicle were based in the case sub judice were far less than the facts which supported the arrest of the defendant in Illinois vs. Gates. In Gates, the police received an anonymous letter regarding allegations of the defendant's drug trafficking.[44] The letter indicated that the defendant's wife would drive their car from Illinois to Florida on a specific date; that the defendant would fly to Florida to meet his wife; and, that the defendant would drive the car from Florida to Illinois.[45] The police corroborated all of these facts through surveillance finding that the defendant flew to Florida on the date predicted; stayed overnight; met his wife; and, drove a car bearing an Illinois license plate issued to the defendant back to Illinois.[46] Based upon the corroboration of the specific details provided by the informant in Gates, it was held that the informant was sufficiently reliable and possessed an adequate basis of knowledge to justify the reliance of the police thereon to warrant the defendant's arrest.[47]

In contrast to the informant's tip in Gates, the information provided by the informant in the instant case lacked any significant details and was uncorroborated beyond the fact that Petitioner Small owned a black Lincoln Town Car. The informant's tip was insufficiently specific to lead to the inference that he had access to accurate information regarding Small's alleged drug dealing. The claim that Small transported Ecstasy from New York to his home in Delaware to sell was not sufficiently detailed to provide any credibility to the informant's allegations concerning Small. This seriously undermined the reliability of the informant's tip as well as the basis for the stop of Small's vehicle.

In conclusion, the totality of the circumstances failed to establish that reasonable suspicion or probable cause existed for the March 7, 2020 vehicle stop. Thus, any

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44 Illinois vs. Gates, supra at 462 U.S. 235.

45 Id.

46 Id.

47 Id. at 462 U.S. 246.

evidence obtained as a result of the illegal vehicle stop should have been suppressed from use as evidence at trial as fruit of the poisonous tree.[48] Accordingly, Petitioner Small's conviction must be vacated.

[48] Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CONCLUSION

On the basis of the facts, law and argument set forth above, Petitioner Fatou Small respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

/s/ John S. Malik
JOHN S. MALIK
100 East 14th Street
Wilmington, Delaware 19801-3255
(302) 427-2247
Counsel for the Petitioner,
Fatou Small

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