ORIGINAL

No. 21-7038

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SUPREME COURT, U.S.

Supreme Court of the United States

JEREMY LILLICH,

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

Jeremy Lillich
Petitioner
17968-029
P.O. Box 5000
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QUESTIONS PRESENTED

Petitioner Jeremy Lillich pleaded guilty, pursuant to a conditional plea agreement, to violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 851, 18 U.S.C. § 2 (Aiding and abetting possession with intent to distribute methamphetamine) based on drugs found in his car and on a companion during a *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The seizure and detention occurred while he was washing his car in a carwash at approximately 2:00 AM. The avowed "reasonable and articulated suspicion" for the *Terry* stop was that the officers suspected petitioner of being in the process of burglarizing the carwash based on the time of night and recent carwash burglaries in the area. When the officers arrived at the scene, they immediately determined that no burglary was in progress or planned. Instead of terminating the encounter when their reasonable suspicion was completely dispelled, however, they extended and expanded the encounter by ordering the production of the identification documents ("ID's")of Petitioner and his companion. Based on computer examination of the ID's, taken and retained by the officers, it was subsequently determined that the companion had an outstanding warrant. A patdown search yielded a small amount of drugs on the companion's person which led to the search Petitioner's car where additional drugs were found. In response to Petitioner's motion to suppress, the district court held that the officers could rely on the previously dispelled reasonable suspicion of burglary to extend and expand the detention. The Court of Appeals affirmed.

1.) Did the lower courts so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision where they allowed the detention of Petitioner to be extended and expanded based on completely dispelled reasonable suspicion?

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 Jeremy Lillich and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page:

Cases

Statutes

Other Authorities

Rules

PETITION FOR A WRIT OF CERTIORARI

Jeremy Lillich, 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 7-29-21.

OPINIONS BELOW

The 7-29-21 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 6 F.4th 869 *; 2021 U.S. App. LEXIS 22466 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 9-2-21. This opinion is an unpublished decision reported at 2021 U.S. App. LEXIS 26673, 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 Northern District of Iowa, was entered on 5-29-20, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the Northern District of Iowa granting & denying motion to suppress was entered on 11-4-19, is reported at 418 F. Supp. 3d 337 *; 2019 U.S. Dist. LEXIS 190597, and is reprinted in the separate Appendix D to this Petition.

The prior Magistrate R&R of the United States District Court for the Northern District of Iowa granting & denying Petitioner's motion to suppress was entered on 7-23-19, is reported at 418 F. Supp. 3d 337 *; 2019 U.S. Dist. LEXIS 190597, and is reprinted in the separate Appendix E to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 7-29-21. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 9-2-21. 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.*

STATEMENT OF THE CASE

On or about 3-20-19 Jeremy Lillich was charged with violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 846, 21 U.S.C. § 851 (Conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which contained 50 grams or more of actual (pure) methamphetamine from on or about January 2018 thru 2-3-19 after prior conviction for a felony drug offense) (Count 1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 851, 18 U.S.C. § 2 (Aiding and abetting possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which contained 50 grams or more of actual (pure) methamphetamine on or about 2-3-19 after conviction for a felony drug offense) (Count 2).

These charges arose from a seizure and detention which occurred while he was washing his car in a carwash at approximately 2:00 AM. The avowed "reasonable and articulated suspicion" for the *Terry* stop was that the two officers suspected petitioner of being in the process of burglarizing the carwash based on the time of night and recent carwash burglaries in the area. When the officers arrived at the scene, they immediately determined that no burglary was in progress or planned. Instead of terminating the encounter when their reasonable suspicion was completely dispelled, however, they extended and expanded the encounter by stating that they "needed"[1] the production of the identification documents ("ID's")of Petitioner and his companion. Based on computer examination of the ID's, taken and retained by the officers, it was subsequently determined that the companion had an outstanding warrant. A patdown search

[1] *United States v. Steffen, et al.*, 418 F. Supp. 3d 337, 347; 2019 U.S. Dist. LEXIS 190597 **7 (ND IA 11-4-19). Contrary to the district court holding, this demand, reasonably construed as an "order", together with the officers' retentention of Petitioner's ID constituted a "seizure" under the Fourth Amendment. See *United States v. Bey*, 911 F.3d 139, 144 (3d Cir. 2018) (submission

yielded a small amount of drugs on the companion's person which led to the search of Petitioner's car where additional drugs were found.

He was arraigned on or about 3-28-19 at which time he pleaded not guilty to the charged violations.

On or about 5-22-19, Jeremy Lillich was charged in a superseding indictment with violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 846, 21 U.S.C. § 851 (Conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which contained 50 grams or more of actual (pure) methamphetamine from on or about January 2018 thru 2-3-19 after prior conviction for a felony drug offense) (Count S1); 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 851, 18 U.S.C. § 2 (Aiding and abetting possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which contained 50 grams or more of actual (pure) methamphetamine on or about 2-3-19 after conviction for a felony drug offense) (Count S2).

On 4-11-19, counsel filed a motion to suppress. In this motion, counsel argued, *inter alia*, that the encounter with the police was not consensual and that there was not reasonable, articulable, suspicion to detain them.

On 6-20-19, a hearing was held on the motion to suppress. At the hearing, the officers involved in the detention testified that upon entering the carwash "bay" where Mr. Lillich was washing his car, they saw no evidence of a burglary[2] but they none the less obtained and

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to order is seizure); *United States v. Chan-Jimenez*, 125 F.3d 1324 * | 1997 U.S. App. LEXIS 26947 ** (9th Cir. 1997) (Individual seized while police retain ID).

[2] Transcript of motion to suppress hearing 6-20-19, pages166, 237. See also *United States v. Steffens*, 418 F. Supp. 3d 337, 347; 2019 U.S. Dist. LEXIS 190597 *7 (ND IA 11-4-19) (Appendix D)

processed the ID's of Mr. Lillich and his companion.[3] The 'processing' of the ID's occurred in the first two officers' car by one officer while the second officer and a third, backup, officer who was called to the scene stayed with Mr. Lillich and his companion for no other reason than to make sure that they didn't leave the scene. The processing of the ID's ultimately resulted in a report that there was a U.S. Marshal report that Mr. Lillich's companion was wanted on drug charges which resulted in him being searched which resulted in seizure of a small amount of methamphetamine from his person which, in turn, resulted in the search of Mr. Lillich's car and seizure of a larger quantity of methamphetamine from the vehicle and the current charges against both Mr. Lillich and his companion. Notably, in final argument, counsel for Mr. Lillich argued that upon the police's immediate discovery that their reasonable suspicion of burglary was dispelled, the officers should have terminated the encounter without demanding ID's.[4]

On 7-23-19, a Magistrate Report & Recommendation was issued recommending partial grant and partial denial of the motion to suppress. Relevant to the issue before this Court, the Magistrate Judge recommended finding that the initial encounter up to the police taking and holding Mr. Lillich's ID was "consensual". (Appendix E)

On 8-12-19, Mr. Lillich filed objections to Magistrate Report & Recommendation. In the objections, Mr. Lillich argued, *inter alia*, that since the reasonable, articulable, suspicion for the *Terry* encounter was immediately dispelled upon the officers' arrival in the carwash, prior to demanding and holding the ID's of Mr. Lillich and his companion, the encounter should have terminated at that point. (CR 85, page 3)[5]

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[3] *Id.* page 199.
[4] *Id.* page 237.
[5] This refers to Entry #85 in the USDC Clerk's Record.

On 11-4-19, the District Court denied the relevant portion of the motion to suppress. In denying the motion to suppress, the District Court held, *inter alia*, that no "seizure" occurred when officers demanded the ID's of Mr. Lillich and his companion. The court also held that even though the reasonable, articulable, suspicion of burglary was immediately dispelled upon the officers' arrival in the carwash, the officers could still rely on the *dispelled* suspicion of burglary to investigate for drug crimes. *United States v. Steffens*, et al., 418 F. Supp. 3d 337, 362; 2019 U.S. Dist. LEXIS 190597 **47-48 (ND IA 11-4-19) (Appendix D).

On or about 11-27-19, Mr. Lillich pleaded guilty to violations of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 851, 18 U.S.C. § 2 (Aiding and abetting possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which contained 50 grams or more of actual (pure) methamphetamine on or about 2-3-19 after conviction for a felony drug offense) (Count S2). (Appendix B) As part of his plea agreement, he was allowed to appeal the denial of his motion to suppress pursuant to Fed.R.Crim.P. 11(a)(2).

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 35 and a Criminal History of VI which resulted in a guideline sentencing range 292-365 months with a statutory mandatory minimum of 180 months: (Presentence Report, ¶¶22-25, 61, 125-126)

On 5-28-20, Mr. Lillich appeared for sentencing. At sentencing, the court acknowledged a dispute over the drug quantity ostensibly supporting the Probation Officer's recommendation and made a downward variance from the Total Offense Level 35 to Level 34 which was the Total Offense Level applicable to the Career Offender guideline. There was no objection to this variance determination. (Transcript of Sentencing 5-28-20, pages 41-42).

On 5-28-20, Mr. Lillich was sentenced to 262 months incarceration for violations of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 851, 18 U.S.C. § 2 (Aiding and abetting possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine which contained 50 grams or more of actual (pure) methamphetamine on or about 2-3-19 after conviction for a felony drug offense) (Count S2). This sentence represented the Career Offender guideline sentencing range. (Appendix B)

The judgment was entered on 5-29-20.

On 5-29-20, a Notice of Appeal was filed. On direct appeal, counsel argued *inter alia*:

> I. THE OFFICERS LACKED REASONABLE SUSPICION TO INITIATE THE FIRST ENCOUNTER AND TO PROLONG THE STOP

(Lillich USCA brief, PDF page 3)

On 7-29-21, the Court of Appeals denied Mr. Lillich's appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that the initial 'encounter' between police and Mr. Lillich was consensual and did not address the fact that reasonable suspicion was completely dispelled upon the arrival of police when they observed that no burglary had occurred, was occurring or was about to occur. *United States v. Lillich, et al.*, 6 F.4th 869 *; 2021 U.S. App. LEXIS 22466 (8th Cir. 7-29-21). (Appendix A)

Counsel timely filed a petition for rehearing. On 9-2-21, the Court of Appeals denied rehearing. (Appendix C)

Mr. Lillich 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. LILLICH'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).[6] 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 the duty of establishing and maintaining civilized standards of procedure and evidence.

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[6] 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)..

McNabb, 318 U.S. at 340.

1A.) The Lower Courts Erred When They Allowed The Detention Of Petitioner To Be Extended And Expanded Based On Completely Dispelled Reasonable Suspicion

In *Rodriguez v. United States*, 135 S. Ct. 1609, 1615, 191 L. Ed. 2d 492 (2015), the Supreme Court construing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), held that a police stop exceeding the time needed to handle the matter for which the stop was made violated the United States Constitution's shield against unreasonable seizures based on the expansion and extension of the seizure beyond that necessary to resolve the reasonable, articulable, suspicion for the initial seizure. While the particular facts in *Rodriguez* involved a traffic stop, the principles apply equally to any *Terry* stop. *United States v. Bey*, 911 F.3d 139, 147 (3d Cir. 2018) (citing *Rodriguez*, supra, at 135 S. Ct. 1609, 1614). As set forth below, the lower courts erred both when they found the 'consensual' nature of the stop of Mr. Lillich and when they allowed the detention of petitioner to be extended and expanded based on completely dispelled reasonable suspicion.

1A1.) Petitioner Was In Fact And Law "Seized" Under The Fourth Amendment When Police Retained His Identification Documents.

When the constitutionality of a search conducted pursuant to consent is challenged, the government bears the burden of proving that consent was freely and voluntarily given. Mere acquiescence to lawful authority or submission to express or implied coercion cannot validate a search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); *Amos v. United States*, 255 U.S. 313, 317, 41 S. Ct. 266, 65 L. Ed. 654 (1921).

While consensual encounters do not implicate the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 574-76, 100 L. Ed. 2d 565, 108 S. Ct. 1975 (1988), a consensual encounter can, however, become an investigatory detention as a result of police conduct. *United States v. Place*, 462 U.S. 696, 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983) (holding that a seizure occurred when defendant refused to consent to search of his luggage and agents said they were going to take it to a judge to get a search warrant).

The Seventh Circuit long ago observed that the retaining of the documents beyond the interval required for the appropriate brief scrutiny, may constitute a 'watershed point' in the seizure question. *United States v. Black*, 675 F.2d 129; 1982 U.S. App. LEXIS 20370 (7th Cir. 1982) (citing *United States v. Viegas*, 639 F.2d 42, 44 n.3 (1st Cir. 1981); *United States v. Elmore*, 595 F.2d 1036, 1042 (5th Cir. 1979); *United States v. Mendenhall*, 446 U.S. 544, 570 n.3, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (White, J., dissenting)). The Seventh Circuit law is consistent with that of the other Circuits which have held that, where police take and retain possession of an individual's airline ticket, car keys or drivers' license, or where they transport the individual to another location as a part of their 'encounter', any subsequent "consent" given to a search must be analyzed under the standards governing consent during an "investigatory detention". *United States v. Lambert*, 46 F.3d 1064; 1995 U.S. App. LEXIS 1986 (10th Cir. 1995) ("what began as a consensual encounter quickly became an investigative detention once the agents received Mr. Lambert's driver's license and did not return it to him."); *United States v. Park-Swallow*, 105 F. Supp. 2d 1211; 2000 U.S. Dist. LEXIS 9728 (D KS 2000) (quoting *United States v. Ashcraft*, 117 F.3d 1429, 1997 WL 400048, at *3 (10th Cir. 1997) ("[A] consensual encounter ordinarily does become an investigative detention once the officer retains (important documents of the

individual) because the individual will not reasonably feel free to terminate the encounter." (citations omitted)); *United States v. Farias*, 43 F. Supp. 2d 1276; 1999 U.S. Dist. LEXIS 484 (D UT 1999) (Defendants' rights were violated where initial traffic stop was valid but police did not return their identification documents and vehicle registration and police questioned them about matters beyond scope of stop with no reasonable suspicion.); *United States v. Walker*, 933 F.2d 812, 817 (10th Cir. 1991) (encounter was "clearly not consensual" and the defendant was not free to leave where officer "retained the defendant's driver's license and registration during the entire time he questioned the defendant); *Padilla v. Miller,* 143 F. Supp. 2d 453; 1999 U.S. Dist. LEXIS 22756 (MD PA 1999) (Trooper made his request to search while in possession of Padilla's driver's license and vehicle registration documents. Thus, Padilla was not in a position where he could refuse Trooper Miller's request and terminate the encounter.); *United States v. McKneely*, 6 F.3d 1447, 1451 (10th Cir. 1993) ("In evaluating whether a traffic stop becomes a consensual encounter, we observe the 'clear line historically drawn between police-citizen encounters which occur before and after an officer returns a person's driver's license, car registration, or other documentation.'"); *United States v. Dortch,* 199 F.3d 193; 1999 U.S. App. LEXIS 33820 (5th Cir. 1999) (Police officers found drugs on defendant during a third pat-down search, after a drug dog alerted to the driver's seat. The court held defendant was not free to leave the encounter. The police officers had taken defendant's driver's license and car rental papers to run a computer check, and did not return them after the check was completed. The officers told defendant they were going to detain the car until a drug dog arrived. The court held the purpose of the computer check was to screen for warrants or determine if the car was stolen. Once the check came back negative, defendant should have been allowed to leave with his car.); *United States v. Page,* 154 F. Supp. 2d 1320; 2001 U.S. Dist. LEXIS 10789 (6th Cir. 2001) (valid traffic stop improperly

converted into investigatory detention with result that consent to search was not voluntary); *United States v. Beck*, 140 F.3d 1129; 1998 U.S. App. LEXIS 6782 (8th Cir. 1998) (same).

In Mr. Lillich's case, as set forth above, he was accosted by 3 armed and uniformed police officers who told him they "needed" his identification documents. *United States v. Steffen, et al.*, 418 F. Supp. 3d 337, 347; 2019 U.S. Dist. LEXIS 190597 **7 (ND IA 11-4-19). While the lower courts overlooked the demand for his documents and simply found the encounter to be "consensual", the lower courts erred. Moreover, in addition to the demand for his documents, the police retained the documents. At this point, there was a "seizure" under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

1A2.) The Seizure Was Without Reasonable, Articulable, Suspicion Because The Officers Had Already Dispelled Said Suspicion

In *State v. Coleman*, 890 N.W.2d 284 * | 2017 Iowa Sup. LEXIS 11 ** (IA SCT 2-10-17), the Iowa Supreme Court surveyed federal case law for cases addressing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) in the context of traffic stops.. The Supreme Court found as follows:

> The United States Court of Appeals for the Tenth Circuit has led the way in considering several traffic-stop cases in which the stop was extended after the underlying purposes were resolved. A frequently cited case in the field is *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994). In McSwain, the sole purpose of a traffic stop was to verify the expiration date on a temporary registration sticker on the rear window of the vehicle. Id. at 559-60. Once the officer determined the temporary registration sticker remained [*290] valid, the court held that "further detention of the vehicle to question [the defendant] about his vehicle and travel itinerary and to request his license and registration exceeded the scope of the stop's underlying justification." Id. at 561.
>
> McSwain thus drew a "sharp contrast" between a situation where a traffic violation "has occurred or is occurring" and one where the reasonable suspicion for the stop had been completely dispelled. Id. (quoting *United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993)). Only in the later circumstance did [**13] the lawfulness of the seizure come to an end. Id. at 562.

In the next case, *United States v. Edgerton*, the Tenth Circuit again considered a case in which a vehicle was stopped because a temporary registration tag could not be read because of darkness. 438 F.3d 1043, 1044 (10th Cir. 2006). The Tenth Circuit held, however, that once the trooper was able to read the temporary tag, the trooper "as a matter of courtesy, should have explained to [the] Defendant the reason for the initial stop and then allowed her to continue on her way without requiring her to produce her license and registration." Id. at 1051.

A third Tenth Circuit case is *United States v. Pena-Montes*, 589 F.3d 1048 (10th Cir. 2009). In that case, the Pena-Montes court confronted the familiar situation in which an officer pulled over a vehicle believing it lacked a license plate, only to discover that the vehicle had a proper "dealer tag." Id. at 1049. In Pena-Montes, the officer did not end the stop at that point, but continued his investigative activities, questioning a passenger about his immigration status. Id. at 1051. After canvassing the facts, the Pena-Montes court concluded that no additional reasonable suspicion was present. Id. at 1058. In response to the government's argument that it is reasonable for officers to enquire about dealer tags after a traffic stop [**14] even if they appeared lawful, the Pena-Montes court declared, "We decline to sign this blank check." Id.

Finally, in *United States v. Trestyn*, the Tenth Circuit considered a similar case in which a vehicle was missing a front license plate, but displayed a rear license plate. 646 F.3d 732, 736 (10th Cir. 2011). As in the other cases, when approaching the vehicle, it became clear that the rear license plate satisfied all statutory requirements. Id. at 744. At that point, according to the Tenth Circuit, questions of the drivers about their travel plans and a request for their licenses "exceeded the scope of the stop's underlying justification because . . . [the officer] no longer had an objectively reasonable articulable suspicion that a traffic violation had occurred or was still occurring." Id.

Another frequently cited case involving extended automobile searches is the Fifth Circuit case of *United States v. Valadez*, 267 F.3d 395 (5th Cir. 2001). In *Valadez*, an officer who passed a motorist traveling in the opposite direction believed the motorist was operating a vehicle with an expired vehicle registration and illegal window tinting and initiated a traffic stop. Id. at 396. When the officer approached the vehicle and spoke with the driver, *Valadez*, the registration issue was quickly resolved, [**15] but the window tinting issue remained. Id. The officer asked *Valadez* for his driver's license and insurance card. Id. When he returned to his patrol car, the officer requested a criminal history check on *Valadez*. Id. While the background check was still in progress, the officer returned to *Valadez's* vehicle with a window-tint meter and determined the windows were legal. Id. But the officer did not terminate the encounter at this point. Id. Although the purpose of the stop had been resolved, the [*291] officer proceeded to ask Valadez if he had any weapons or drugs in the vehicle. Id. *Valadez* responded that he had a loaded pistol in the front seat of the car and a rifle in the trunk. Id. The officer removed the weapons from the car to run a check to determine if they were stolen. Id. The results of his background check indicated that *Valadez* had a criminal history but did not apparently indicate whether it involved misdemeanors or felonies. Id. The officer returned to *Valadez's* vehicle and asked him whether he had a felony conviction. Id.

Valadez responded that he was not sure, but that he might have a felony conviction. Id. After being transported to the station, *Valadez's* prior conviction [**16] was confirmed as a felony. Id. at 397. He was subsequently charged with the crime and entered a conditional guilty verdict allowing him to contest an unfavorable suppression ruling. Id.

The Fifth Circuit reversed the district court's denial of *Valadez's* motion to suppress. Id. at 399. The Fifth Circuit noted that *Valadez* did not dispute the initial lawfulness of the stop. Id. at 398. But the Fifth Circuit reasoned that once the officer determined that the registration was valid and the window tinting was lawful, at that point he had no basis to continue the stop. Id. The Fifth Circuit emphasized the detention was lawful up until the purposes of the stop were resolved, but when those purposes were resolved, there was no lawful reason to detain *Valadez*. Id.

The Sixth Circuit considered the validity of an extension of a traffic stop in United States v. Jones, 479 F. App'x 705 (6th Cir. 2012). In Jones, the Sixth Circuit held that a police officer exceeded the scope of a traffic stop for failure to display proper license plates when he detained the driver after he observed a lawful temporary tag in plain view. Id. at 712; see also United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants [**17] unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention.").

The Second Circuit grappled with an automobile stop in *United States v. Jenkins*, 452 F.3d 207 (2d Cir. 2006). In *Jenkins*, the officers believed that the vehicle pulled over lacked appropriate license plates. Id. at 209. After the stop, the officer became aware of a temporary plate posed on the vehicle. Id. When the officers approached the vehicle to speak to the driver, however, they smelled marijuana. Id. A subsequent search turned up unlawfully possessed firearms. Id. at 210.

The fighting issue in *Jenkins* was whether the police acted lawfully after their concern about unlawful licensure had been resolved. Id. at 212-13. The defendant claimed that once the officers observed the temporary license plate they could proceed no further and were required simply to waive the motorist on. Id. at 211. The state contended that the officers could reasonably approach the driver to explain the reason for the stop. Id. The Second Circuit agreed, noting that in McSwain, the Tenth Circuit suggested in dictum that such a courtesy was not unlawful. Id. at 213.

A number of reported United States district court decisions follow the general approach of the Second, Fifth, Sixth, [**18] and Tenth Circuits. In *United States v. Salinas*, the United States district court considered a case where a stop was initiated because of suspicion of a violation of the Texas license plate display requirement. 665 F. Supp. 2d 717, 718-19 (W.D. Tex. 2009). The district court noted that the officers could have determined even before they asked for the driver's license and [*292] proof of insurance that there was not a violation of the Texas license plate requirement. Id. at 721. Because "[t]hey did not encounter reasonable suspicion of an additional violation—

driving without a license—until after his traffic stop for failure to display a front license plate should have ended," the evidence should have been suppressed. Id.; see also *United States v. Castro*, 929 F. Supp. 2d 1140, 1152 (D.N.M. 2013) ("[O]nce the officer's suspicion that a traffic violation occurred is dispelled, prolonging the detention by retaining the defendant's identification, questioning the defendant further, or waiting for the outcome of a computer check, even if the check is in progress, is improper and a violation of the Fourth Amendment.").

In *United States v. Smith*, the United States district court considered whether a traffic stop could be extended in an obscured license plate case. 37 F. Supp. 3d 806, 808 (M.D. La. 2014). The district court determined that once the license plate issue was resolved, [**19] there was no further basis to detain the driver. Id. at 813-14. In Smith, the roadside officer had received statements from another officer that the motorist was believed to be a member of a motorcycle gang and suspected drug dealer. Id. at 812-13. This alone, however, did not justify prolonging the search. Id. at 813. While the state argued that officer safety was involved, the court rejected the argument, noting among other things that the officers did not act as if they were in fear of their safety, did not conduct pat-downs of either occupant of the car prior to their eventual arrest, and did not isolate them out of the car in order to separate them from a potential weapon. Id.

Finally, a federal district court in Iowa considered a traffic-stop issue similar to that raised in this case. In *United States v. Wise*, Chief Judge Longstaff considered a prolonged detention after any potential reason for the stop—a question about temporary tags—had been resolved. 418 F. Supp. 2d 1100, 1102 (S.D. Iowa 2006). Relying on Edgerton, Judge Longstaff concluded that the deputy unlawfully detained the defendants when they asked for identification and brought one of the defendants back to the police car, because his investigation was no longer related to the purpose of the [**20] stop. Id. at 1108.

The Eighth Circuit, however, has declined to follow the approach of the Fifth, Sixth, and Tenth Circuits. For example, in *United States v. $404,905.00 of U.S. Currency*, the Eighth Circuit held that additional detention for thirty seconds to two minutes after the traffic stop was complete was lawful. 182 F.3d 643, 649 (8th Cir. 1999), abrogated by *Rodriguez v. United States*, 575 U.S. , 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015). The Eighth Circuit reasoned that a two-minute canine sniff was de minimis, noting, among other things the "strong interest in interdicting the flow of drugs on the nation's highways." Id.

State v. Coleman, 890 N.W.2d 284 * | 2017 Iowa Sup. LEXIS 11 ** (IA SCT 2-10-17) (emphasis added)

In *United States v. Bey*, 911 F.3d 139, 144 (3d Cir. 2018), the Court of Appeals reversed a district court denial of a motion to suppress a gun found on an individual after ordering him to

stop and then frisking him. Police had been looking for a robbery suspect and observed an individual walking away from them in the general area where the suspect was thought to be. They told him to stop and turn around which he did. At that point, the officers immediately saw that they did not have the suspect but they none-the-less frisked him and found a weapon. The Court of Appeals held that when the suspicion of the individual was dispelled, the police should have "immediately" released him without further investigation.

As set forth above, the charges against Mr. Lillich arose from a seizure and detention which occurred while he was washing his car in a carwash at approximately 2:00 AM. The avowed "reasonable and articulated suspicion" for the *Terry* stop was that the two officers suspected petitioner of being in the process of burglarizing the carwash based on the time of night and recent carwash burglaries in the area. When the officers arrived at the scene, they immediately determined that no burglary was in progress or planned. Instead of terminating the encounter when their reasonable suspicion was completely dispelled, however, they extended and expanded the encounter by stating that they "needed"[7] the production of the identification documents ("ID's")of Petitioner and his companion. Based on computer examination of the ID's, taken and retained by the officers, it was subsequently determined that the companion had an outstanding warrant. A patdown search yielded a small amount of drugs on the companion's person which led to the search of Petitioner's car where additional drugs were found.

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[7] *United States v. Steffen, et al.*, 418 F. Supp. 3d 337, 347; 2019 U.S. Dist. LEXIS 190597 **7 (ND IA 11-4-19). Contrary to the district court holding, this demand, reasonably construed as an "order", together with the officers' retentention of Petitioner's ID constituted a "seizure" under the Fourth Amendment. See *United States v. Bey*, 911 F.3d 139, 144 (3d Cir. 2018) (submission to order is seizure); *United States v. Chan-Jimenez*, 125 F.3d 1324 * | 1997 U.S. App. LEXIS 26947 ** (9th Cir. 1997) (Individual seized while police retain ID).

Based on the foregoing facts and law, the police should not have told Mr. Lillich that they "needed" his identification documents and, instead, they should have left the scene. Failure to do so deprived Mr. Lillich of his Fourth Amendment constitutional rights. *Id.*

Based on all of the foregoing, the lower courts erred when they allowed the detention of petitioner to be extended and expanded based on completely dispelled reasonable suspicion. *Id.*

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

Mr. Lillich's conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Mr. Lillich'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. Lillich's sentence.

First Step Act

Mr. Lillich 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. Lillich'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 2B are submitted to preserve Mr. Lillich'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. Lillich's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Jeremy Lillich respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[8] to the court of appeals for reconsideration in light of *Rodriguez v. United States*, 135 S. Ct. 1609, 1615, 191 L. Ed. 2d 492 (2015).

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[8] 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).