

Docket No. **05-4663**

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BRYANT YARBROUGH

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Brief on Appeal for Defendant-Appellant

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Statement of Jurisdiction

The defendant-appellant, Bryant Yarbrough was charged by indictment in the District Court of the Northern District of New York. The sole count alleged a violation of Title 18, United States Code, Sections 922(g) and 924(a)(2). Mr. Yarbrough was arraigned on the indictment and undersigned counsel was appointed to represent him. He entered a plea of not guilty.

Mr. Yarbrough filed pre-trial motions seeking suppression of evidence obtained during a traffic stop. Those motions were denied and he eventually changed his plea. Mr. Yarbrough conditionally pled guilty pursuant to a plea agreement. As part of the agreement he reserved his right to contest the suppression decision of the district court and withdraw his plea. A. 105. He was sentenced on August 16, 2005. He received a sentence of 35 months concurrent with any state sentence and 3 years supervised release. A. 134-135. A notice of appeal was timely filed. A. 140-141.

This plea and sentence is a final judgment of the United States District Court for the Northern District of New York. 18 U.S.C. § 3582(b). Mr. Yarbrough may not appeal directly to the Supreme Court. This Court has jurisdiction to review a challenge to a denial of a suppression motion that has been specifically reserved as part of a plea agreement. *See* United States v. Burke, 517 F.2d 377,

379 (2d Cir. 1975)(Listing cases allowing reservation of appeal right).

Statement of the Issues Presented

- I. WHETHER THE DISTRICT COURT ERRED WHEN IT DENIED AN EVIDENTIARY HEARING RELATED TO THE STOP OF BRYANT YARBROUGH ?**

- II. WHETHER THE DISTRICT COURT ERRED WHEN IT FOUND THAT THE OFFICERS EXECUTING THE STOP HAD REASONABLE SUSPICION TO DO SO WITHOUT AN EVIDENTIARY HEARING AND WITHOUT CONSIDERATION OF THE “TOTALITY OF THE CIRCUMSTANCES” ?**

- III. WHETHER THE DISTRICT COURT ERRONEOUSLY DENIED THE MOTION TO RECONSIDER ?**

Statement of the Case

Mr. Yarbrough appeared for an arraignment on a federal complaint on September 27, 2004. Magistrate Judge Randolph Treece appointed the Federal Defender Office to represent Mr. Yarbrough. An indictment was voted on October 1, 2004. Mr. Yarbrough appeared on the indictment and entered a plea of not guilty. The pre-trial order was issued. Docket No. 9, A. 130. Mr. Yarbrough was remanded.

Mr. Yarbrough filed a motion to suppress on November 5, 2004. A. 1-27. The Government filed a response on November 30, 2004. A. 28-48. Mr. Yarbrough replied to the Government's response on December 6, 2004. A. 49-53. On January 4, 2005 District Court Judge Lawrence E. Kahn issued a decision denying a suppression hearing and denying the motion to suppress. A. 54-64. Mr. Yarbrough filed a motion to reconsider on January 14, 2005. A. 66-77. A compact disk noted as Exhibit #2 was filed as an attachment to the Defendant's Motion for Reconsideration. A. 132, *Clerk's Correction of Docket Entry*. The Government filed a response on February 4, 2005. A. 78-86. The District Court denied the Motion for Reconsideration. A. 87-99.

Mr. Yarbrough pled guilty to Count 1 of the Indictment after execution of a plea agreement. A. 117-118. The plea agreement reserved the right of Mr.

Yarbrough to appeal the adverse determinations of the pre-trial motions and the motion to reconsider pursuant to Federal Rule of Criminal Procedure, Rule 11(a)(2). A. 105, ¶ 6(d). The agreement also allowed for the withdrawal of his plea upon a favorable ruling on appeal. The District Court accepted the plea. A. 125-126.

Mr. Yarbrough was sentenced on August 16, 2005. A. 134. He received 35 months imprisonment running concurrent to a state sentence. A. 135. In addition, the court imposed a three year term of supervised release. A. 136. The Judgment in a Criminal Case was filed on August 22, 2005. A. 134. The Notice of Appeal was filed on August 24, 2005. A. 140-141.

Statement of Relevant Facts

On October 8, 2004 Mr. Yarbrough was arraigned on a federal indictment charging violations of 18 U.S.C. § 922(g) and 924(a)(2). He was arraigned on the indictment and the District Court issued the Standing Pre-trial Order setting discovery and motions deadlines as well as trial dates.¹ Mr. Yarbrough timely filed a motion to suppress on November 5, 2004. A.1-27.

Mr. Yarbrough sought suppression, “the evidence seized during the search of the vehicle on the basis that the traffic stop of Mr. Yarbrough’s vehicle was initiated without reasonable suspicion that a crime had been or was being committed by him or probable cause that a traffic infraction had been committed by him.” A. 5. Mr. Yarbrough included five exhibits with his motion. He specifically referenced Exhibit A, the report of Lieutenant Todd Alaxanian, and Exhibits D and E, the supporting depositions of complainants to support his argument that the facts did not support a finding that the officers had reasonable suspicion when they stopped Mr. Yarbrough. A. 3-5. Mr. Yarbrough alleged that the Government stopped the car of Mr. Yarbrough without knowing the name of

¹ This order was created to set a time frame for disclosure of materials to both parties and to eliminate the need to file demands and pleadings to seek such materials covered by the order. This order tracks the language of Local Rule 14.1 governing discovery in criminal cases in the Northern District. See <http://www.nynd.uscourts.gov/localrul.htm> , Rule 14.1 (January 2005).

the suspect and only having the description, black, male. A. 3-4.

In response, the Government submitted two affidavits from the officers. The affidavits were virtually identical. The paragraphs describing the facts of the stop read, that a radio broadcast to all units stating that a black male was threatening a juvenile with a handgun at Van Rensselaer Village Apartment Number 5H and he may be leaving the scene in a vehicle. A.42-43, ¶ 3; A. 46-47, ¶ 3. The only additional facts were that Lieutenant Alaxanian was informed of the suspect's name and he gave that information to Officer Spain at the scene. A. 43, ¶ In addition, Officer Spain alleged that he saw the driver was a black male at the time the stop was occurring. A. 47, ¶7.

Mr. Yarbrough replied and maintained his argument that a hearing was necessary due to the differences in the reports of the events and the information known to the officers at the time they decided to initiate the stop. His motion to suppress was denied. He filed a motion for reconsideration based upon additional information from the belatedly disclosed audio recording which further undermined the accounts of the officers. First, they were informed the suspect was on foot and no description other than black male was issued. A. 72-73.

The District Court denied the motion for reconsideration.

Summary of the Argument

A material factual dispute was raised by Mr. Yarbrough related to the propriety of the stop that led to the search and eventual seizure of a firearm from him. As a result of the questions related to the stop, the denial by the District Court of the request for a suppression hearing was error. In addition, the District Court erred in finding based upon the pleadings alone, that there was reasonable suspicion to stop the car that Mr. Yarbrough was driving.

In addition, the untimely disclosure of information related to the stop severely limited the ability of Mr. Yarbrough to fully present his suppression arguments and support those arguments. Denial of the motion to reconsider punished the defendant for the Government's failing to comply with Local Rules of the Northern District of New York and the Federal Rules of Criminal Procedure.

Argument

I. **The District Court Denial of an Evidentiary Hearing Related to the Stop of Mr. Yarbrough was an Abuse of Discretion**

Upon denying the request for a hearing by Mr. Yarbrough, the District Court stated, “assuming the facts as Yarbrough states them to be, as a matter of law, the officers had an objective and articulable reasonable suspicion to conduct an investigatory stop.” A. 64. The Court erred in two respects in making this pronouncement. First, the legal standard addressing the propriety of the stop and guiding which facts are legally determinative for assessing whether a hearing is necessary, is not a finding of an “objective and articulable reasonable suspicion”. A.64. Rather, the standard looks to whether the facts forming the "reasonable suspicion" provided " 'a particularized and objective basis' for suspecting the person stopped of criminal activity.” Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). *See* Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)(To stop an individual briefly to investigate the circumstances provoking suspicion, an officer must be "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

Secondly, the question for the District Court in its decision to grant a

hearing was not whether one party of the other could prevail as a “matter of law” based upon its recitation of the facts. Instead, the District Court should have determined whether Mr. Yarbrough had specifically, definitively and in a detailed manner contested the facts going to the validity of the search placing them in question. United States v. Watson, 404 F.3d 163, 167 (2d Cir. 2005). See United States v. Robinson, 153 F.Supp.2d 188, 192 (E.D.N.Y. 2001)(Differing factual accounts in which defendant alleged promises of leniency were made by officers and officers denial led to a sufficient factual dispute related to the voluntariness of the statements to require a hearing).

Once Mr. Yarbrough had presented the facts in dispute raising a Fourth Amendment challenge it was up to the Government to prove by a preponderance of the evidence that the police had a reasonable suspicion of unlawful conduct, based upon specific and articulable facts, in order to stop the car Mr. Yarbrough was driving. United States v. Shamsideen. 2004 WL 1179304, *2 (S.D.N.Y.) (Available only through Westlaw citation)(Both the Supreme Court and the Second Circuit have held that there are situations where the burden of persuasion at a suppression hearing can shift to the Government to prove, by a preponderance of the evidence, that the proffered evidence is valid)(citations omitted). Upon founding its decision on the facts advanced by Mr. Yarbrough, the District Court

failed to indicate that the Government had met its burden of proof or simply did not entertain the shifting of the burden and the proof failed to assess the “totality of the circumstances”. This abridgement was an abuse of discretion given the number of factual disputes in the record.

Review of a district court's denial of a defendant's request for a suppression hearing is for abuse of discretion. See United States v. Pena, 961 F.2d 333, 339 (2d Cir.1992); cf. United States v. Levy, 377 F.3d 259, 264 (2d Cir.2004) (“[R]eview of the District Court's denial of a request for an evidentiary hearing [is] for abuse of discretion.”). A suppression hearing is ordinarily required if “the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question.” Watson, 404 F.3d 163, 167 (2d Cir.2005) (*quoting Pena*, 961 F.2d at 339)(emphasis added).

The suppression issue in the present case related to the legality of stopping and detaining a car and its driver. Therefore, the material facts were those that could have formed the basis for the officer’s having reasonable suspicion or probable cause to stop the car. See Delaware v. Prouse, 440 U.S. 648, 653 (1979); See United States v. Harrell, 268 F.3d 141, 148 (2d Cir. 2001)(A traffic stop is a “limited seizure” within the meaning of the Fourth and Fourteenth Amendments to

the United States Constitution); United States v. Scopo, 19 F.3d 777, 781 (2d Cir.1994)(*same*).

When determining whether a police officer had reasonable suspicion to stop an individual, the district court must evaluate the "totality of the circumstances" to assess whether the detaining officer has a "particularized and objective basis" for suspecting illegal activity. United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744 (2002). The material facts are all those facts known to the officer at the time that he decides to make the stop. *See* Florida v. J.L., 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."). *See also* United States v. Price, 599 F.2d 494, 501 (2d Cir.1979). Also material are those facts that contribute to assessing whether the suspicion of illegal activity is particularized and objective to the person stopped.

Mr. Yarbrough provided five exhibits and an affidavit in support of his Motion to Suppress. These exhibits were created by the arresting agency. They included statements of the arresting officers and supporting witnesses. The citations to them and the exhibits themselves were nonconjectural. In addition, Mr. Yarbrough argued that specific information possessed by the officers who stopped him did not give rise to reasonable suspicion or probable cause to make

the stop. A. 5.

In support of his argument Mr. Yarbrough provided an affidavit and referenced the five exhibits in his statement of facts. Facts raised by the defense included, that the officers did not know Mr. Yarbrough or know his name prior to executing the stop, that the report was from an unknown source, that the only description was of a “black male”, that no description of the car was given, and that the report was a gun was used to threaten another in an apartment in a multi-unit housing complex. A. 3. In addition, Mr. Yarbrough argued that the traffic citations issued could not have provided cause for the initial stop because the facts providing the basis for those citations were not known to the officers at the time of the stop. A. 8.

In its response the Government submitted the affidavits of the two arresting officers. The affidavits were heavily cited in the district court’s denial of the suppression hearing and motion to suppress. The affidavit of Lieutenant Alaxanian stated that he had received a radio broadcast to all units stating that a black male was threatening a juvenile with a handgun at Van Rensselaer Village Apartment Number 5H and he may be leaving the scene in a vehicle. A. 42-43, ¶ 3. He then averred that he was informed by Nextel that the suspect’s name was “Bryant Yarbrough.” A.43, ¶ 3. Upon arriving at the entrance of the apartment

complex he “positioned [his] marked patrol car in the middle of the street in order to block entry to and egress from the apartments.” A. 43, ¶ 4. He was joined by Officer Mark Spain who also parked his car to block the entry. A. 47, ¶ 4. Officer Spain affirmed verbatim the same broadcast information as Lieutenant Alaxanian. A. 46-47, ¶ 3.

After Officer Spain arrived a vehicle approached he observed the driver was a black male. A. 47, ¶ 7. The officers stopped the car. Lieutenant Alaxanian then observed that the driver was alone, a black male and that he appeared to meet the general description of the suspect. A. 43, ¶ 7.

The only description that both of the officers advanced in their affidavits was that the suspect was a black male, his name was Bryant Yarbrough and he was leaving by vehicle. The Assistant United States Attorney in the body of his argument alleged that “additional information communicated included a general description of the suspect”. A. 30-31. Although, Lieutenant Alaxanian stated that it appeared that Mr. Yarbrough matched a general description he did not indicate what the description was or when he received it. In addition, he alleged in his affidavit that he did not note the specifics of the driver until after the car was stopped. A. 43, ¶ 7. Neither officer stated that the basis for stopping the car was a traffic infraction.

Mr. Yarbrough replied and directed the Court's attention to an audio recording which had not been previously provided to the defense.² That audio recording was a contemporaneous account of the call that gave rise to the stop, the dispatch of the officers, and the resolution of that dispatch call.³

The conflicting statements considered with the facts highlighted by the defense gave rise to differing accounts of the events and the information known by the officers prior to the stop and detention of Mr. Yarbrough. The officers admittedly did not see who was in the car until it stopped. One officer refers to the person matching a general description, but none is given, other than "black male." No description was alleged of a car.

These disputed facts were alleged in detail and went unaddressed as the District Court simply adopted the affidavits of the arresting officers without addressing those portions of the affidavits that were contradicted by previous police reports, witness depositions and the contemporaneous audio recording. *See*

² The Local Rules and Standing Order governing discovery in the Northern District of New York obligate the Government to tender materials related to suppression within 14 days of the arraignment. Mr. Yarbrough did receive some items within that time, however, the audio recording was not provided until after his initial pleading had been filed. The audio recording creates additional contradictions with the police statements.

³ Mr. Yarbrough summarized the dispatch recording in his Motion for Reconsideration raising the additional fact that the officers had been told Mr. Yarbrough was on foot the night he was stopped in the car. A. 73.

United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976), *cert. denied*, 434 U.S. 878, 98 S.Ct. 230, 54 L.Ed.2d 157 (1977)(The circumstances surrounding a stop are not to be dissected and viewed singly; rather they must be considered as a whole.)(quotation omitted). This adoption was an abuse of discretion. *See Arvizu*, 534 U.S. at 274, 122 S.Ct. 744(Under the totality of the circumstances standard, a court cannot simply evaluate and reject each factor in isolation from the other factors). *See also United States v. Cady*, 1996 WL 650662 (N.D.N.Y.1996)(“[B]y alleging facts, if proven true, that would entitle him to the relief he seeks,” a defendant satisfies the threshold to warrant an evidentiary hearing).

II. The Stop and Detention of Mr. Yarbrough Was Without Reasonable Suspicion Because it was not Based on Specific, Articulable Facts Forming the Basis for a Particularized suspicion of Mr. Yarbrough.

The reasonable suspicion determination does not depend upon any one factor, but on the totality of the circumstances. *See United States v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). In assessing whether reasonable suspicion is present, the Court of Appeals reviews the district court's findings of historical fact for clear error and the determination of reasonable suspicion de novo. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134

L.Ed.2d 911 (1996).

The Supreme Court held in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that a police officer who observes suspicious circumstances may, though he lacks the probable cause traditionally necessary to make an arrest, stop an individual briefly to investigate the circumstances provoking suspicion, provided the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. at 1880. To determine whether an investigatory stop is justified, "the totality of the circumstances--the whole picture--must be taken into account." United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). "[R]easonable suspicion" is " 'a particularized and objective basis' for suspecting the person stopped of criminal activity." Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (quoting *Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). This assessment begins with the facts know to the officer at the stop's inception. See Terry, 392 U.S. at 20 (The court must determine whether "the officer's action was justified at its inception" when assessing whether a stop is reasonable under the circumstances.).

At the time that Lieutenant Alaxanian and Officer Spain parked their cars

blocking the entry to and from the apartment complex, they had nothing more than a generalized hunch that the suspect may be leaving the area. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (holding that a stop was improper where officers asked a "suspicious-looking" man to identify himself without any other articulable basis to suspect wrongdoing). Although, "the concept of reasonable suspicion is not susceptible to precise definition some minimal level of objective justification" is required which is more than an "inchoate suspicion or mere hunch". *United States v. Glover*, 957 F.2d 1004, 1009-10 (2d Cir.1992). (quoting *Sokolow*, 490 U.S. at 7, 109 S.Ct. 1581).

All that was known of the suspect at the time that the officers stopped the approaching car was that he was a black male, in a vehicle, named "Bryant Yarbrough" who was alleged to have threatened someone with a gun. A. 43 & 47, ¶¶ 3 & 3. The officers then proceeded to stop the car, and from the blockade of the entryway appear to have intended to stop every car, leaving the area based solely on that information.

Although, Mr. Yarbrough subsequently received traffic citations, those citations should not have played a role in the propriety of the stop since neither officer indicated in their affidavits that the reason they stopped the car was because of a traffic infraction and none of the reasons for the citations were known

prior to the stop. See United States v. Moorefield, 111 F.3d 10, 12 (3d Cir.1997)(citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)).

The District Court found in its decision that Lieutenant Todd Alaxanian and Officer Mark Spain received a radio call around 4:30 a.m. on March 21, 2004 that “a black male was threatening a juvenile with a handgun in Van Rensselaer Village Apartments (“Apartments”), apartment number 5H and that the suspect may be leaving the scene in a vehicle.” A. 54. This information was adopted from the affidavits of Lieutenant Alaxanian, Officer Spain.⁴ The District Court further found that Lieutenant Alaxanian was informed on his Nextel that the suspect was “Bryant Yarbrough”. A. 54.

The facts known to the officers at the time they stopped the car do not support the finding that they had a particularized, objective and reasonable suspicion to stop that car. One officer indicated he had not seen the driver, the other indicated he only saw the driver after the stop was initiated. A. 43, ¶ 7; A.

⁴ The district court decision also references the Reply Memorandum of Bryant Yarbrough at n.1 as supporting this factual statement. The note cites the content of an audio recording as providing a set of facts not known to the defense at the time of the filing of the original and states those cited facts did not affect the basis for the stop. The reference to the footnote is erroneous because it does not provide support for the factual statement the District Court makes in its decision. Rather the note states, “[t]hose additional facts possibly known to officers were the identity of the caller; the identity of the victim; the suspect was a black male; the incident was in apartment 5H; and the suspect’s name was Bryant Yarbrough.” A. 50.

47, ¶ 7.⁵ Although both officers indicated that the radio transmission told the suspect was leaving by vehicle, the actual recording revealed they had been told that he was on foot after they questioned the dispatcher about that fact. A. 70, 73. Thus, only fact that the officers could have particularized to that vehicle was that it was leaving an area where a suspected criminal act occurred.⁶

The District Court erred by limiting its consideration the facts and the eventual finding of reasonable suspicion. *See* United States. v. Jaquez, 421 F.3d 338, 341 (5th Cir. 2005)(The sparse and broadly generic information provided by the dispatcher, without more, was insufficient to support a determination of reasonable suspicion, as required under *Terry* where officer knew only that "a red vehicle" had been involved in a reported incident approximately 15 minutes earlier, in the same general area where the officer first spotted the car. Except for its color, the officer did not have any particular information about the vehicle, such as its make or model, or any description of its occupant(s)). *See also* United States v. Hudson, 405 F.3d 425 433-434 (5th Cir. 2005) (Officers not justified in intercepting and stopping car when they had no more than a “hunch” that the

⁵ The district court decision discounted the identity of the driver as a factor not influencing the reasonable suspicion even though both Officers advanced that fact in their affidavits. A. 59, n. 5.

⁶ These facts were not advanced by either officer in support of their decision to stop the car.

suspect might be a passenger in the car).

This dearth of particularized facts coupled with the part of the decision being based on the report of possession of a gun controverts the holding of *Florida v. J.L.*, 529 U.S. 266, 273-74, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) and furthers the requirement that the decision be vacated and remanded. *Id.* (Supreme Court ruled that there is no "gun exception" to the reasonable suspicion requirement). *See also* United States v. Bold, 19 F.3d 99, 104 (2d Cir.1994)(In a case decided prior to *J.L.* , when a tip concerned an individual with a gun, the totality of the circumstances test should include the possibility of gun possession and the subsequent need for prompt investigation). *Accord* United States v. Harrell, 268 F.3d 141, 150 (2d Cir. 2001) (Meskill, J., *concurring*)(After *J.L.*, the possibility of the presence of a gun alone cannot lower the threshold required for reasonable suspicion).

In addition, race, when considered by itself and even in conjunction with other factors, does not generate reasonable suspicion for a stop. *See, e.g.*, Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769 (1996)(referring to race as a "decidedly impermissible factor []" on which to exclusively base a stop); United States v. Brignoni-Ponce, 422 U.S. 873, 885-87, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (holding that apparent Mexican ancestry of car occupants did not justify

stop based on suspicion that they were illegal aliens); Brown v. City of Oneonta, New York, 221 F.3d 329, 334 (2d Cir. 2000) (allowing plaintiffs to proceed with their Fourth Amendment claims in 42 U.S.C. § 1983 suit against city because plaintiffs were apparently seized on account of race, and "a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure").

Also, the appearance of “not stopping” cannot play a role in the calculus of reasonable suspicion because the situation was manufactured by the police themselves.⁷ *Cf. Wong Sun v. United States* 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963) ("A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked."). A car was coming from an apartment complex where a suspect was last reported being seen and the car was not appearing to slow down. The stopping of this car was neither particularized nor objective given the information known to the officers. *See J.L.*, 529 U.S. at 271 (The totality-of-the-circumstances test is limited, however, to what the officer knew before the suspect was detained or

⁷ The Assistant United States Attorney again attempts to insert facts in support when he states that the officers were concerned for their safety. A. 31.

frisked). *See also* United States v. Yousif, 308 F.3d 820, 828-829 (8th Cir. 2002) (The initial stop and detention of the defendant's vehicle and its occupants constituted an unlawful seizure under the Fourth Amendment because the blocking of an exit off the highway resulting in a stop was not supported by a particularized and objective facts supporting a suspicion of the defendant's vehicle).

In reviewing a district court's determination with respect to reasonable suspicion, we scrutinize *de novo* the district court's ultimate determination with respect to the existence of reasonable suspicion. Arvizu, 534 U.S. at 275, 122 S.Ct. 744 (2002). When determining whether a police officer had reasonable suspicion to stop an individual, the district court must evaluate the "totality of the circumstances" to assess whether the detaining officer has a "particularized and objective basis" for suspecting illegal activity. Arvizu, 534 U.S. at 273, 122 S.Ct. 744 (2002). Under this standard the court must view the circumstances in their entirety and determine whether a reasonable officer would have believed that he had a "particularized and objective basis" for suspecting illegal activity. *Id.* at 273-74, 122 S.Ct. 744.

Stopping an automobile and detaining its occupants constituted a 'seizure' within the meaning of the [Fourth and Fourteenth] Amendments, even though the

purpose of the stop is limited and the resulting detention quite brief." Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Where law enforcement officers are not acting for a special purpose such as patrolling the borders or roadway safety, it is unreasonable under the Fourth Amendment to stop a vehicle and detain its driver to check his or her license and registration, **unless** the officers have at least articulable and reasonable suspicion that the driver is not licensed, that the automobile is not registered, or that the automobile or one of its occupants is otherwise subject to seizure for a violation of the law. *Id.* at 663, 99 S.Ct. 1391. (emphasis added).

Allowing the type of stop in this case to stand would be condoning a police action specifically cited as unconstitutional in City of Indianapolis v. Edmond. 531 U.S. 32, 37-38, 121 S.Ct. 447, 451, 452 (2000). (Listing Supreme Court precedent recognizing the limited circumstances in which the absence of individualized suspicion was not required of the officers for searches and brief seizures of motorists) (citations in original).

As a result of the lack of any particularized and objective facts providing the basis for the officers decision to block the entry way to the apartment complex and eventually stop the car that came along, the District Court's denial of the motion to suppress was erroneous.

III. **The Denial of the Motion for Reconsideration was an Abuse of Discretion**

A Motion to Reconsider is governed in the Northern District of New York by pursuant to Local Rule 7.1(g). U.S. Dist. Ct. Rules, N.D.N.Y., L.R. 7.1 (Amended, Aug. 1, 2005). The Local Rule does not state the applicable standard. In its decision the District Court relied on prior decisions of the Northern District Court and cited the Government in its papers to hold rule that only three possible grounds for relief upon moving for reconsideration were cognizable. Those bases were: “(1) an intervening change in the law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice. In re C-TC 9th Ave. P’ship, 182 B.R. 1,3 (N.D.N.Y. 1995)(McAvoy, C.J).” A. 90. The standard of review of a district court's decision to grant or deny a motion for reconsideration of a suppression order is abuse of discretion. *See* United States v. Bayless, 201 F.3d 116, 131 (2d Cir. 2000)(District Court’s denial of motion to reconsider is reviewed for abuse of discretion).

Counsel for Mr. Yarbrough was provided with an audio copy of the call to the Albany Police Department and the dispatch conversation with the police officers after he had submitted his motion to suppress the evidence obtained

during the traffic stop.⁸ This item was in the sole possession of the Government and was unobtainable by the defense. It contained information directly related to the issue of the reasonableness of the stop of Mr. Yarbrough and as a result was discoverable under Rule 12(b)(4)(B) the Federal Rules of Criminal Procedure. Allowing the decision to stand based upon this record would be punishing the defendant for an act that was beyond his control—the timely disclosure of information related to suppression issues.

Presenting this information to the Court as part of a Motion to Reconsider allowed the court the opportunity to assess the implications of the newly acquired evidence in support of submission. However, the Court once again abused its discretion by failing to acknowledge the significance of the audio recording. At the very least, the recording established the need for a hearing for showing the inconsistency between the officers affidavits and the dispatcher's relaying of information.

The decision of the District Court would also create a rule requiring the

⁸ This audio recording was received from the Government after the initial suppression motion. The belated disclosure came three weeks after Mr. Yarbrough reiterated the obligations imposed under the standing Pre-trial Order by letter the week before motions were due and over four weeks from the disclosure deadline. *See United States v. Elliot*, 363 F. Supp.2d 439 (N.D.N.Y. 2005)(District court admonishing the parties for failing to comply with the standing pre-trial order). *See also United States v. Miller*, 382 F. Supp.2d 350 (N.D.N.Y. 2005)(Restating Government's obligation to provide timely disclosure because of the implications delay has upon the defendant's ability to fully present suppression issues).

defendant to offer a justification beyond the lack of timely disclosure by the Government for having not presented the evidence initially when generally the Government is given broad discretion upon seeking to reconsider denial of a suppression hearing based on the need to present “new” evidence. Bayless, 201 F.3d at 131- 132 (Government had additional evidence in its possession but made strategic choice not to proffer at suppression hearing). For the reasons argued in Parts I and II, the need for the hearing and the lack of reasonable suspicion based upon the officers accounts, the district court erred in not finding that an error of law had been committed.

In a similar situation with later disclosure of highly relevant and significantly dispositive information, another district court was admonished for not giving the information due consideration upon the motion of the defendant. *See* United States v. Barlow, 308 F.3d 895 (8th Cir. 2002)(The District Court vacated district court's finding, on defendant's renewed suppression motion made before plea hearing, should have considered contents of police officer's registration check printout, which was admitted into evidence at plea hearing, and which bore on the officer's credibility, before denying defendant's renewed suppression motion at the plea hearing. *See also* United States v. Garcia-Beltran, 389 F.3d 864, 869 (9th Cir. 2004)(Vacating and remanding because the factual

record was incomplete after the denial of a suppression hearing).

CONCLUSION

WHEREFORE, Mr. Yarbrough respectfully requests the Court of Appeals for the Second Circuit issue an order vacating the decision denying the motion to suppress, and enter an order suppressing the physical evidence and statements of Mr. Yarbrough because the District Court erred in finding that the stop was based upon reasonable suspicion.

In the alternative, Mr Yarbrough requests that the Court remand the case for vacation of the order denying the suppression hearing on the basis that the motion for suppression raised specific, non-conjectural facts that remain in dispute, requiring a full development of the record prior to a finding of whether the specific, articulable facts known to the officers at that time presented reasonable suspicion to stop Mr. Yarbrough.

Mr. Yarbrough reserves his right upon suppression of the evidence to request that he be allowed to withdraw his plea.

DATED: December 5, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

1. Exclusive of the portions exempted by 2ND CIR. R. 32, this brief contains 6053 words.
2. This brief has been prepared in proportionally spaced typeface using Corel WordPerfect 8.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

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