

# 05-4026-cr(L)

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 05-4026-cr(L); 05-4238-cr(XAP)

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UNITED STATES OF AMERICA,

Appellant-Cross-Appellee,

-against-

DUSTIN L. McCARGO,

Defendant-Appellee-Cross Appellant.

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APPEAL FROM A FINAL JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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AMICUS CURIAE BRIEF ON BEHALF OF DUSTIN L. McCARGO

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## **ISSUE PRESENTED**

Whether the evidence was properly suppressed based on an unconstitutional stop and frisk.

## **STATEMENT OF THE CASE**

### **PRELIMINARY STATEMENT**

This brief is submitted on behalf of the Federal Public Defenders Offices of the Second Circuit. On March 30, 2006, this Court issued an order inviting the Federal Public Defender's Offices of the Circuit to file a joint amicus brief in this case. The Court directed that the brief be filed by April 14, 2006. A copy of the Court's order is attached to this brief.

### **STATEMENT OF FACTS**

Mr. McCargo was arrested and indicted on a charge of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). He moved to suppress the firearm and a subsequent admission he allegedly made, arguing that the evidence was the product of an unlawful search and seizure. Following an evidentiary hearing, a Magistrate Judge recommended that the district court grant Mr. McCargo's motion and suppress the gun and the post-arrest statement. The district court agreed. The Government appeals that ruling.

**A. The evidence at the suppression hearing<sup>1</sup>**

**1. The 911 call reporting an attempted burglary**

- a. The caller reports that "a few" people are trying to break into her house.

Shortly before 1:00 a.m. on July 28, 2003, in Buffalo, New York, a woman called 911 to report that several people were trying to break into her house at 501 Berkshire Street. GX 1, 2; JA.123.<sup>2</sup> The caller initially said she believed "someone is trying to break into my house." JA.123. In elaborating, however, she said "it's a few of them." JA.123. She thereafter referred to a plural number of burglars. She said, "I heard them at my front door and I looked out the side window and I seen someone coming from around the side so I believe it's a few of them out there." JA.123.

When asked whether the perpetrators had "any weapons, anything like that," the caller responded that she had "no clue." JA.124. She added that the perpetrators were playing "loud music": she said, I "heard loud music out there, but they shut it off so I'm not sure if they are about to leave or what." JA.124.

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<sup>1</sup> The hearing on Mr. McCargo's motion to suppress evidence was held before Magistrate Judge H. Kenneth Schroeder.

<sup>2</sup> The tape of the 911 call was admitted as Government Exhibit ("GX") 1. A transcript of the 911 tape was introduced as Government Exhibit 2 and is reproduced in the Joint Appendix ("JA") at pages 123 to 125. "JA." references are to the pages of the Joint Appendix filed with this Court by the parties in the case.

- b. The caller "couldn't tell" if they were men or women.

The 911 operator asked the caller whether she had gotten "a look at anybody" and "were they men, women, do you know?" JA.124.

The caller answered,

I couldn't tell, when I looked out my side window, I seen one of them coming from the side and I can't even tell if it's a man or a woman really.

JA.124.

- c. Officer Sterlace wrongly believes that the caller reported that "a black male" was involved

Although the 911 caller was unable to describe any of the burglars -- even as to race or gender -- Officer Christopher Sterlace told the federal Grand Jury that the caller had said "there was a black male that went around to the back of her house into the yard." Sterlace: JA.33, 131; GX. 31 [Grand Jury transcript, dated Aug. 27, 2003]. At the suppression hearing the following summer (on June 18, 2004), however, the prosecutor had Officer Sterlace review the message the police dispatcher had sent out. Sterlace acknowledged that it did not mention a black male or an African-American male. Sterlace: JA.34. When asked why he had testified otherwise in the Grand Jury, Officer Sterlace said he must have made a mistake, but he added "I'm not sure." Sterlace: JA.34. Sterlace eventually acknowledged that he had not actually

received any information about the race or gender of any of the burglars. JA.34.

**2. The police officers' sighting of Mr. McCargo walking on the street**

Officer Sterlace and his partner Mark White were in their marked police car about two blocks away from 501 Berkshire when they received the police dispatch about the 911 call. About two minutes after the call, they notified the radio dispatcher that they were headed to 501 Berskshire and drove down Berkshire Street. White: JA.70; Sterlace: JA.16, 41.<sup>3</sup>

The officers quickly approached the intersection of Berkshire Street and Suffolk Avenue. Sterlace: JA.19-20, 44; White: JA.73. The intersection was about five houses or 200 feet from 501 Berkshire. Sterlace: JA.19-20, 44; White: JA.71-73. There, they "noticed a black male crossing the street going northbound." White: JA.71. It was Mr. McCargo. He was "walking" by himself. No one else was on the street. Sterlace: JA.19, 21, 42; White: JA.72.

Mr. McCargo was walking on Suffolk Avenue. This street intersected Berkshire at a right angle; he was crossing from the side of Berskshire that the caller's house was on to the opposite side. Another police car was already parked outside of 501

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<sup>3</sup> The 911 call was made at 12:53 a.m. (and 44 seconds). JA.27. At 12:55 a.m.(and 54 seconds), the officers "radioed that we were going to the scene." JA.28.

Berkshire Street. Mr. McCargo was thus between the approaching police car and 501 Berskhire Street. White: JA 71-73; Sterlace: JA.18-19.

On seeing Mr. McCargo, the officers immediately decided to stop him and take him to 501 Berkshire for a showup. Officer Sterlace said,

When I saw him crossing the street, I said to my partner, let's -- let's talk to this guy, see if he'll come back for a show up, see if the witness can identify who was trying to get into her house and so forth.

Sterlace: JA.22.

The officers said that Mr. McCargo was "staring at the police car that was in front of 501." Sterlace: JA.21, 43; see also White: JA.71-72. Officer Sterlace claimed that this "aroused our suspicion that maybe he knew what was going on there." Sterlace: JA.58. He also said that Mr. McCargo did not notice the officers' car as they pulled alongside him when he reached the other side of Berkshire Street. White: JA.74.

The officers got out of their car. Officer Sterlace called out to Mr. McCargo in a voice that was "[m]ore of a command" and told him "to come over to the police car and put his hands on the car[.]" Sterlace: JA.22, 68. Officer Sterlace required Mr. McCargo to stretch out his arms and place his hands on the hood of the police car. He also made Mr. McCargo spread his legs; Mr. McCargo was a tall man and had to lean over to comply. Sterlace:

JA.47-48. Sterlace explained that when he frisks someone, he "kind of want[s] them off balance." Sterlace: JA.47. He ordered Mr. McCargo to get into this position so he "could do a pat down search." Sterlace: JA.22.

Mr. McCargo "came over very compliant." Sterlace: JA.68. Officer Sterlace had not told Mr. McCargo why he had stopped him when he began "patting him down." Sterlace: JA.23-24, 48. Sterlace "believe[d]" that, as he patted down Mr. McCargo, he asked him where he was coming from and that Mr. McCargo answered that he "was coming from [his] boy's house." Sterlace: JA.23 ("as I'm asking him this, I was patting him down...").

Officer Sterlace felt the butt of a handgun when he "searched [Mr. McCargo's] waistband." Sterlace: JA.24-25. According to Sterlace, he said "what's this?" And Mr. McCargo sort of jumped back. This action caused the gun to come out his pants and become lodged in his sweatshirt before falling to the ground. Sterlace: JA.24-25. Sterlace yelled at his partner that Mr. McCargo had a gun, and after a "very brief" struggle, Mr. McCargo was handcuffed. Sterlace: JA.25; see also White: JA.76. The officers recovered a .357 magnum handgun and arrested Mr. McCargo. See indictment; JA.7-8; Sterlace: JA.25.<sup>4</sup>

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<sup>4</sup> Mr. McCargo was subsequently given Miranda warnings and taken to Central Booking. While being taken to a holding cell, he allegedly said that he had a ".357." Sterlace: JA.35-38; White: JA.80-83, 88-89. Sterlace said that there was no show-up because  
(continued...)

Officer Sterlace said he searched Mr. McCargo because he was going to put him in the backseat of the police car and take him to 501 Berkshire Street "for a show up." Sterlace: JA.22, 25. It is a "department policy" to search everyone they put in the back of the police car. Sterlace: JA.23; White: JA.77-78.

In addition, both officers answered yes to a leading question about whether the neighborhood where 501 Berkshire was located was a "high crime area."

Q. [The prosecutor]: I see. This particular area, sir, is it a high crime area?

A. [Sterlace]: Yes, it is.

JA.21.

Q. [The prosecutor]: Sir, is the intersection or the area of the intersection of Berkshire and Suffolk Avenue in Buffalo a high crime area?

A. [White]: Yes, it is.

JA.73.

### **3. The defense case**

A defense investigator went to the area around 501 Berkshire Street and photographed the street. Berkshire was a one-way street that ran west to east. Gethoefer: JA.90-97. Accordingly, the Officers -- who testified they were driving east on Berkshire when

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<sup>4</sup> (...continued)  
"[t]he complainant did not wish to be a complainant." Sterlace: JA.49.

they saw Mr. McCargo<sup>5</sup> -- were traveling the wrong way on the one-way street. Gethoefer: JA.94-96.<sup>6</sup> And the traffic would be coming from the opposite direction the officers were coming from, which was the general direction Mr. McCargo was supposedly looking.

#### **4. Officer Sterlace's testimony on retaking the stand**

After a discussion among the court and the parties and following a short recess (JA.100-107), the prosecutor asked to be allowed to recall the officers. The court granted the request over objection. JA.107-08.

On retaking the stand, Officer Sterlace claimed for the first time that he considered the fact that Mr. McCargo was walking on Suffolk Avenue to be significant. He said that the 911 caller had said she had "seen someone go to the back of her house" and if a person were able to negotiate the backyards of the five houses between 501 Berkshire Street and Suffolk Avenue, the person could have come out on Suffolk: "[i]f they would have hopped the fence and then come through the yards up north -- or up westbound to Suffolk." Sterlace: JA.109. When asked whether a person could have gone from the back of 501 Berkshire to Suffolk Avenue, the Officer said, "He would had [sic] to go through four or five yards, but, yes." Sterlace: JA.110.

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<sup>5</sup> Sterlace: JA.18-19; White: JA.71, 73; GX 4.

<sup>6</sup> See also JA.64 (prosecutor stipulates that a defense photograph showed a one-way street sign posted on Berkshire Street).

On cross-examination, Officer Sterlace acknowledged that he had "no idea what's behind 501 Berkshire[.]" JA.110. He admitted that he had never gone into any of the backyards between 501 Berkshire and Suffolk Avenue or "examine[d] any of those backyards." JA.111.

**B. The decisions on the suppression motion**

**1. Magistrate Judge's Report and Recommendation**

The Magistrate Judge issued a Report and Recommendation on February 25, 2005. The Report recounted the facts related at the hearing (JA.157-62). Regarding the description that the 911 caller gave, the court noted that

[t]here was nothing in the information transmitted by the police dispatcher to Officer Sterlace and White "that the perpetrators of this burglary were African-American males" or any other race. There was no description given of size of the individuals, clothing worn, or even gender. The only thing that they knew was that there allegedly was more than one person involved.

JA.158.

The Magistrate Judge applied Terry v. Ohio, 392 U.S. 1 (1966), in evaluating the lawfulness of the stop and frisk. It first addressed whether the officers could properly stop Mr. McCargo. JA.166-67. And second, it addressed "the search issue." JA.167.

The court concluded that it was reasonable for the officers "to briefly detain the defendant for purposes of making an investigatory inquiry of him under the principles of Terry,"

JA.167, because “‘criminal activity was afoot’ in the area of Berkshire and Suffolk in the City of Buffalo on July 28, 2003 at approximately 12:53 a.m.” JA.166 (citing Terry, 392 U.S. at 30).

But the only factor the court identified that was specific to Mr. McCargo was that Mr. McCargo was “the only person the officers saw in the area.” JA.167. It also cited “[t]he 911 call by the occupant of 501 Berkshire, coupled with the information conveyed by the Buffalo Police dispatcher to the officers of an attempted burglary and the immediate proximity in time and location of Officers Sterlace and White to the area of Berkshire and Suffolk. . . .” JA.166-67. It further noted that “the area in question was known by police officers to be a high crime area, and the alleged activity was occurring at night when such crimes are perpetrated.” JA.167.

Although the Magistrate Judge found that an investigatory stop was justified, he did not identify the scope of what the police were authorized to do upon stopping Mr. McCargo: i.e., only ask him questions or take him away for a showup.<sup>7</sup>

The Magistrate Judge next concluded that the police did not have sufficient reason for the frisk, which occurred essentially at the inception of the encounter and before the officers asked Mr.

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<sup>7</sup> As the Government notes in its reply brief, neither the Magistrate Judge or the district court “even considered whether the officers effort to perform a show-up was justified.” Gov’t Reply at 4.

McCargo any questions. The court determined that there was no reason to believe that Mr. McCargo was armed and dangerous. JA.167. Mr. McCargo was not "acting in a threatening manner or in the process of flight," there was no bulge, and his hands were not "positioned in such a way that he may be reaching for a weapon...." JA.167-68. In addition, the 911 caller said she had "'no clue'" whether there were "'any weapons, anything like that.'" JA.168.

The Magistrate Judge specifically rejected the contention that Mr. McCargo's looking at the police car parked in front of 501 Berkshire Street was suspicious, finding it "to be totally without merit and reject it as such." JA.167, 168. The Magistrate explained,

People often stare at police cars, ambulances and other such types of emergency vehicles during the course of an event in which such vehicles are involved. "Rubbernecking" is a common human trait in the exercise of human curiosity during such type events.

JA.168.

Because the Magistrate Judge found that the evidence failed "to establish a 'reasonable suspicion' by Officer Sterlace to justify the frisk or pat down" of Mr. McCargo, he recommended that Mr. McCargo's motion to suppress the gun and ammunition be granted. JA.170. The Magistrate further recommended that the statement Mr. McCargo allegedly made to the cell-block attendant be suppressed as the fruit of the unconstitutional search and seizure. JA.170-77.

## 2. The district court's decision

The district court adopted the Magistrate Judge's Report "in its entirety," agreeing that an investigatory stop was reasonable because "it was reasonable for the Officers to believe that 'criminal activity was afoot' in the area of Berkshire and Suffolk." JA.184, 188. It cited the following facts:

First, they received a 911 call stating such. Furthermore, the Officers were in a high crime area at a high crime time of night.

JA.188.

The court, however, concluded that the Magistrate Judge "was correct in finding that the pat down was unreasonable." JA.191. The court, therefore, found that the pat down of Mr. McCargo was unlawful and suppressed the gun and the statement. JA.192-94.

### SUMMARY OF ARGUMENT

The lower courts were correct in concluding that the seizure of the gun was the product of an unconstitutional search. But they were wrong in concluding that the facts available to the officers justified a Terry stop. This Court may of course "affirm on any ground for which there is a record sufficient to permit conclusions of law, including grounds not relied on by the district court." United States v. Glover, 957 F.2d 1004, 1013 (2d Cir. 1992) (citation and internal quotation marks omitted).

The police officers could have approached Mr. McCargo and asked him questions, without any level of suspicion, as long as

they did not coerce him to cooperate. See United States v. Drayton, 536 U.S. 194, 201 (2002). Had the officers simply posed questions to Mr. McCargo when they initiated the encounter, there would have been no seizure. Id.

But here, the officers seized Mr. McCargo before they asked him anything. Officer Sterlace immediately commanded Mr. McCargo to put his hands on the police car so he could be frisked. He admitted that on seeing Mr. McCargo, he decided to put him in the police car and transport him to 501 Berkshire Street. Only when Officer Sterlace had already started patting down Mr. McCargo, did the Officer ask him where he was coming from.

To seize Mr. McCargo off the street in this way, the police officers needed a "particularized and objective" basis to believe he was one of the group of burglars. See United States v. Cortez, 449 U.S. 411, 417-18 (1981). This level of suspicion they did not have. Accordingly, their seizure of Mr. McCargo and their almost simultaneous search of him violated the Fourth Amendment. The evidence resulting from this conduct was, therefore, properly suppressed.

The lower courts' rationale for concluding that an investigatory stop was justified was that the officers had reason to believe that "criminal activity was afoot" in the area Mr. McCargo was walking, a phrase taken from Terry. But to justify a Terry stop, the police must have a particular suspicion that the

"the particular person stopped" was engaged in or about to engage in a crime. See Cortez, 449 U.S. at 417-18. The mere fact that a crime has been committed, without reasonable suspicion pointing to the defendant as the perpetrator, is insufficient to justify a seizure.

The factors cited by the Government do not provide a "particularized and objective basis for suspecting that the particular person stopped" -- here, Mr. McCargo -- was involved in the attempted burglary. See Cortez, 449 U.S. at 417. Most of the factors it cites simply amount to Mr. McCargo being in the vicinity of the attempted burglary, located in a "high crime" neighborhood. See Gov't Reply at 1-2. The only behavior particular to Mr. McCargo that it cites is his looking at a police car that had just arrived at the caller's house, which the lower courts rejected because it was not suspicious behavior.

The factors cited by the Government, taken as a whole, do not provide a reasonable basis to believe Mr. McCargo was among the group of burglars. Mr. McCargo's walking on the street in the vicinity of the attempted burglary is not sufficient for reasonable suspicion. Nor does his walking in a supposedly "high crime" neighborhood create a reasonable suspicion. See Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000) ("presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is

committing a crime"). Presence in a high crime area is not relevant to the reasonableness analysis when a specific crime has been reported, and the police are looking for a particular person or persons. See Wardlow, 528 U.S. at 124-25. Here, there was an actual report of an attempted burglary. The overall rate of crime in a neighborhood where a specific crime has been reported does not assist in determining whether a particular person in that neighborhood committed the crime. See e.g., United States v. Swindle, 407 F.3d 562, 570 (2d Cir. 2005) (stop unreasonable where "Swindle was simply a black man in a high-crime area driving a car that the wanted fugitive had previously had been seen 'near'").

In addition, the Government misstates New York law in asserting that, under New York law, the officers in this case could have whisked Mr. McCargo off the streets and taken him away for a show up. New York has "a graduated four-level test for evaluating street encounters initiated by the police." People v. Moore, 2006 N.Y. slip op. 1249, 2006 WL 396946 (N.Y. Feb. 21, 2006). Although New York does permit the police to question someone even when they have no "objective, credible reason" for targeting the person, it does not allow them to be searched and seized in that situation. People v. Hollman, 581 N.Y.S.2d 619, 627-28 (N.Y. 1992). Thus, under New York law, the level of suspicion the officers in this case had would only have allowed them to question Mr. McCargo, not take him for a show-up.

## ARGUMENT

**The record did not provide a "particularized and objective basis" for the officers to believe that Mr. McCargo was one of the burglars.**

The Fourth Amendment protection against unreasonable searches and seizures "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." Terry v. Ohio, 392 U.S. 1, 8-9 (1968). For "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person[.]" Id. at 9 (citation and internal quotation marks omitted).

The police may approach a person to pose questions and ask for identification, even when they have no basis for suspecting a particular person, provided they do not coerce the person's cooperation. United States v. Drayton, 536 U.S. 194, 201 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage -- provided they do not induce cooperation by coercive means") (citing Florida

v. Bostick, 501 U.S. 429, 434-35 (1991)).<sup>8</sup> This would not be a seizure, and no Fourth Amendment concerns would be raised.

A seizure occurs within the meaning of the Fourth Amendment when a police officer interferes with a person's possession and control of his or her person by, for example, using "language or [a] tone of voice indicating that compliance with the officer's request might be compelled" or when there is "some physical touching of the person of the citizen." United States v. Mendenhall, 446 U.S. 544, 554 (1991) (plurality opinion of Stewart, J.).

Here, Officer Sterlace seized Mr. McCargo when -- in his first words to Mr. McCargo -- he "command[ed]" him to place his hands on the hood of the police car and spread his legs and when Mr. McCargo complied with this demand. As the Supreme Court explained in Terry, "whenever a police officer accosts an individual and restrains his freedom to walk away, [the officer] has 'seized' that person." Terry, 392 U.S. at 16. Moreover, a "frisk" -- "the careful exploration of the outer surfaces of a person's clothing

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<sup>8</sup> Since the Government suggests that New York law supports the seizure here, it is noteworthy that New York has specifically declined to apply the Bostick rule. People v. Hollman, 581 N.Y.S.2d 619, 627-28 (N.Y. 1992). For police to approach a person to ask "basic non-threatening questions regarding, for instance identity, address, or destination," the officers would need "an objective, credible reason" for targeting the person. Id. at 621-25. To ask more pointed questions, for instance those focusing on the defendant as a suspect, requires a higher level of suspicion. Id.

all over his or her body in an attempt to find weapon" -- is a "'search.'" Id. And such a search is no "petty indignity." Id. at 16-17. It is

a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with hands raised .... It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment and is not to be undertaken lightly.

Id. at 16-17 (footnotes omitted).

Although the Terry court did not define exactly when reasonable circumstances exist for stopping someone, it subsequently held that "an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981)). The Cortez court explained that an investigatory stop is justified if, based on the whole picture, the detaining officers had "a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981); accord, United States v. Arvizu, 534 U.S. 266, 273 (2000). "[A]n assessment of the whole picture must yield a particularized suspicion ... that **the particular individual being stopped** is engaged in wrongdoing." Cortez, 449 U.S. at 418 (emphasis added). It added that

[t]his demand for specificity in the information upon which police action is

predicated is **the central teaching of this Court's Fourth Amendment jurisprudence.**

Id. (emphasis in original) (quoting Terry, 392 U.S. at 21, n.18); see also Reid v. Georgia, 448 U.S. 438, 440 (1980) ("any curtailment of a person's liberty by police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.")

**A. The seizure of Mr. McCargo was improper because there was not a "particularized and objective basis" for suspecting he was among the group of people who had tried to burglarize the caller's house.**

Officers Sterlace and White did not have a "particularized and objective basis for" suspecting that Mr. McCargo had been among the people who had tried to enter 501 Berkshire Street. They had no description of any of the perpetrators. As the Magistrate Judge found, there was no description of the "size of the individuals, clothing worn, or even gender." JA.158. The "only thing [the officers] knew" "was that there allegedly was more than one person involved." JA.158. But Mr. McCargo was walking by himself.

Mr. McCargo was not coming out of the caller's house, nor was he found on the property of the house. And he was not hiding nearby, in bushes or under a car. Moreover, he was walking, not running. There was no testimony that he was sweating or appeared out of breath. The only other factor the officers had was Officer Sterlace's belief that there was a non-existent description of a black male perpetrator.

The only behavior identified by the officers, apart from his presence, was his looking at a police car that had just parked in front of the caller's house. But as the courts below found, looking at a police car that had just responded to an emergency is not suspicious; it is simple human nature. JA.168, 187. It is "a common human trait" to be curious about and to "stare at police cars, ambulances and other ... emergency vehicles." JA.168. The police car parked in front of 501 Berkshire must have just arrived -- in haste and probably with lights flashing -- when Mr. McCargo was walking by because Sterlace and White arrived in the area only minutes after the 911 call had been made. Therefore, the police car that had beaten Sterlace and White to the scene had probably just sped up to the house and parked. A police car arriving under these circumstances, in answer to an emergency, would necessarily catch a person's attention.

Nor did the fact that 501 Berkshire was supposedly in a "high crime" neighborhood provide a particularized reason to suspect Mr. McCargo of being one of the burglars. The "high crime" area rationale is irrelevant when the police are already investigating a specific crime, and the issue is simply whether there is reasonable suspicion to believe that the defendant is the person who committed the crime.

The Supreme Court has noted that an "individual's presence in the area of expected criminal activity, standing alone, is not

enough to support a reasonable, particularized suspicion that the person is committing a crime." See Illinois v. Wardlow, 528 U.S. 119, 124 (2000). The category of cases in which a neighborhood's character is relevant to the reasonable analysis, is when there has been no reported crime in a high crime neighborhood -- i.e., "an area known for heavy narcotics trafficking" -- and the defendant does something out of the ordinary such as running at the sight of police officers. Id. at 121, 124. In Wardlow, for example, the defendant fled at the mere sight of the police, and "[h]eadlong flight -- whenever it occurs" is suggestive of wrongdoing. Id. at 124; see also Brown v. Texas, 443 U.S. 47, 52 (1979) (no reasonable suspicion when defendant observed in alley of a neighborhood known for drug dealing and police merely claimed he "looked suspicious").

Thus, there is no "high crime" neighborhood exception to the requirement of a particularized basis for suspecting a defendant of a particular crime. The Supreme Court has recognized that it can be one factor in the reasonableness calculation when there has been no report of a crime and the defendant acts suspiciously like running away; these facts can provide a basis to believe the defendant is engaged in some unreported crime. See Wardlow, 528 U.S. at 124-25. But when there has been a report of particular crime in a neighborhood, then the overall incidence of crime in the area is logically irrelevant to whether a particular person who is not acting suspiciously has committed the reported crime.

**B. That Mr. McCargo was walking in an area where there was a reported crime -- i.e., where "criminal activity was afoot" -- did not provide reasonable suspicion that he was involved with the burglars.**

The lower courts apparently concluded that an investigatory stop of Mr. McCargo was justified simply because there was a reasonable basis to believe that "criminal activity was afoot" in the area. JA.166, 188. The phrase is taken from Terry -- but badly out of context. 392 U.S. at 30. The Fourth Amendment demanded "a particularized and objective basis" for suspecting that Mr. McCargo was involved in the burglary before he could be seized. See United States v. Cortez, 449 U.S. at 417-18. In Terry, the determination that there was a suspicion that "criminal activity afoot" necessarily cast particular suspicion on the people the officer seized: the criminal activity suspected was that the suspects themselves were casing a store for a robbery. Terry, 392 U.S. at 6.

"The Terry court did not define, in 1966, exactly when reasonable circumstances exist for stopping an individual." 3A Charles Alan Wright et al., Federal Practice and Procedure: Criminal 3d, § 668.6, p. 237 (3d ed. 2004). But subsequent cases have held that "'an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.'" 3A Charles Alan Wright, et al., Federal Practice and Procedure: Criminal 3d, § 668.6, p. 237 (3d ed. 2004) (quoting Cortez, 449 U.S. at 417). There must be "a

particularized and objective basis for suspecting that the particular person stopped criminal activity." See United States v. Cortez, 449 U.S. at 417-18.

Accordingly, that someone in the area reported an attempted burglary -- i.e., that there was "criminal activity afoot" -- is not a particularized basis that would justify seizing anyone who happened to be in that area. It does not provide "a particularized" basis "for suspecting that the particular person stopped" -- here, Mr. McCargo -- of being involved in the criminal activity being investigated: the attempted burglary. See Cortez, 449 U.S. at 417-18.

In sum, this is a case where the only description the officers had was of a group of people, and Mr. McCargo was walking alone on the street near the site of the reported crime. If in this case there is reasonable suspicion to stop Mr. McCargo, who did not fit a description -- he was walking alone, not in a group -- then the resulting principle would be that there is reasonable suspicion to stop anyone in the area of a recently reported crime. This would be a massive and inappropriate expansion of the police power to seize citizens. Particularly when coupled with a "high crime" rationale, this would eviscerate the requirement of a particularized suspicion in any neighborhood that is characterized as being high crime.

**C. The factors cited by the Government, taken as a whole, do not demonstrate "a particularized" basis for suspecting that Mr. McCargo was one of the burglars.**

**1. The majority of the facts the Government cites amount only to a showing that Mr. McCargo was in the vicinity of 501 Berkshire.**

The Government in its reply brief lists several facts as providing a reasonable suspicion that Mr. McCargo was involved in the attempted burglary. Gov't Reply at 1-2. Only one of these facts refers to any specific behavior by Mr. McCargo: i.e., that he was looking at a police car. Gov't Reply at 2 [factor 7]. The other six factors, however, are simply that he was in the vicinity of a recently reported crime and that the neighborhood was a "high crime" area.

The Government notes that the intersection he was crossing was about 200 feet from 501 Berkshire, that a burglar fleeing through the rear of the site could have ended up on Suffolk Avenue, that it was within minutes of the 911 call, and that Mr. McCargo was the only person on the street. Gov't Reply at 1-2. These facts simply add up to his being in the vicinity of a recently reported crime.

But Mr. McCargo's being in the vicinity of the crime, walking openly on the street, is not particularized evidence that he had committed a crime. That Mr. McCargo was alone on the street, did not cast particular suspicion on him, given that the 911 caller reported that several people were trying to break in -- not a lone person.

His walking on the street in the vicinity of the crime would apply to anyone else who happened to be on that street. If there had been twenty or thirty people on the street, under the Government's rationale, the officers would have been justified seizing all of them and taking them to the caller's house for show ups. The photographs of the neighborhood around 501 Berkshire, which the defense introduced, show that it is a residential neighborhood. JA.149-53. In a place such as this, where people make their homes, there is a good chance of people innocently walking on the street, whether going or coming home or coming out of their houses out of curiosity about the sudden arrival of a police car.

Moreover, the Government's reference to the neighborhood as a "high crime" one is not probative of whether Mr. McCargo, who was not acting suspiciously, should be suspected of a particular crime. As noted, when, as here, there is a report of a specific crime in a neighborhood, the incidence of crime in the neighborhood is not relevant. It does not point to whether a particular person in that neighborhood is the perpetrator of the crime. It is a different situation when no crime has been reported, and the defendant who is in a place of "heavy narcotics trafficking" does something highly suspicious, such as going into a "[h]eadlong flight" at the appearance of the police. Wardlow, 528 U.S. at 121, 124-25. That situation is not present here.

**2. The only behavior particular to Mr. McCargo that the Government cites is his looking at the police car in front of 501 Berkshire.**

As noted, the only behavior particular to Mr. McCargo that the Government cites -- other than his being alone in a supposedly high crime neighborhood -- is his looking at a police car parked in front of the caller's house. But as the Magistrate Judge noted, looking a police car responding to a report of a crime is not unusual but a "common human trait." JA 168. "People often stare at police cars, ambulances" and other "emergency vehicles during the course of an event in which such vehicles are involved." Id. Human curiosity is excited by the sight of emergency vehicles like police cars responding to an emergency; staring at a police car under these circumstances is not suspicious. Id.; JA.187.

**3. Contrary to the Government's assertion, the officers' seizure of Mr. McCargo was not permitted under New York law.**

The Government asserts that "had the propriety of the officers' conduct in this case been tested in New York State Courts, those Courts would have, in all likelihood, upheld the lawfulness of the officers' action." Gov't Reply at 9. This is not so. New York law is more restrictive than federal law about when a police officer can approach a citizen. See People v. Hollman, 581 N.Y.S.2d 619, 627 (N.Y. 1992) (declining to adopt federal law allowing police to approach people and question them for any reason). Under New York law, the officers could only have

approached Mr. McCargo and questioned him based on the information they possessed, not detain him.

New York has a "graduated four-level test for evaluating street encounters initiated by police[.]" People v. Moore, 2006 N.Y. slip op. 1249, 2006 WL 396946 (N.Y. Feb. 21, 2006). Each level authorizes a greater degree of interference with a person's liberty "and consequently requires escalating suspicion on the part of the investigating officer." Hollman, 581 N.Y.S.2d. at 621. Here, the police, approaching Mr. McCargo -- without any description of the perpetrators other than that were "a few of them" and no evasive action by Mr. McCargo -- had a "Level One" right to request information of him -- such as identity, address, or destination. This lowest level of inquiry requires only "an objective credible reason, not necessarily indicative criminality," but does not permit a stop and detention. Id.

A "Level One" suspicion requires that the officers have an "objective credible reason not necessarily indicative of criminality." Hollman, 581 N.Y.S.2d at 621. An example, would be an officer in a bus terminal observing the nervous, evasive behavior of a person who is also looking around and giving unusual attention to his bag. Id. at 621-23, 626-27. This level of suspicion allows police to ask questions about identity, address, and destination. Id.

A "Level Two" suspicion requires "a founded suspicion that criminality is afoot." But it does not authorize a seizure. Hollman, 581 N.Y.S.2d at 625. It allows the officer to do more than ask for pedigree information but to engage in "accusatory" questioning "focusing on the possible criminality of the person approached...." Id. at 625. An officer acquires this level of suspicion when, for example, the defendant lies to the officer or acts suspiciously. Id. at 626.

A stop and detention requires "Level Three" suspicion. Moore, 2006 WL 396946. This requires a "reasonable suspicion that the particular individual was involved in a felony or misdemeanor." Id. This is the equivalent of Terry stop under New York law.<sup>9</sup> Finally, "Level Four" suspicion is probable cause for arrest.

In this case, the Officers did not have the quantum of suspicion to seize Mr. McCargo and take him for a show-up under New York law, in the absence of a description or suspicious behavior. They could only question him.

"Vague and general descriptions are not sufficient to constitute reasonable suspicion." People v. Dubinsky, 734 N.Y.S.2d 245, 246 (2d Dep't 2001). Thus, in People v. Thomas, 752 N.Y.S.2d 70 (2d Dep't 2002), the court held that a description of a black male in black clothing did not justify detaining a person found in

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<sup>9</sup> New York also has a stop and frisk statute, setting out a similar standard for a stop and search. N.Y. Criminal Procedure Law § 140.50(1), (3).

the vicinity of the crime wearing dark blue clothing, when there was no evidence he "was out of breath, engaged in any suspicious behavior, or made any attempt to flee." Thomas, 752 N.Y.S.2d at 71. Accordingly, the court suppressed the on-the-scene showup identification and the defendant's statement. Id.

Moreover, in People v. Hicks, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (N.Y. 1986) -- where New York's highest court held that a lawfully detained suspect could be transported for a show-up -- the defendants met the description of the robbers. The robbers were described "as two black men," both about five feet five inches tall..., and the officer who encountered the two defendants "observed that both men seemed about five-feet five-inches tall." 68 N.Y.2d at 237. Even so, the officer did not simply seize them at that point. He asked them where they were coming from, and they lied to him: they said they were coming from work at a place the Officer "knew was not in the area, and in fact was miles away in the opposite direction." Id. Only then did the officer order them from the car, frisk them, and take them for a show up. Id.

Moreover, this case is also in marked distinction from the other New York case the Government cites -- in addition to Hicks -- for its assertion that the conduct here would be lawful in New York. Gov't Reply at 9. In People v. Gamble, 620 N.Y.S.2d 655 (4th Dep't 1994), an officer observed the defendant "who matched the detailed description broadcast by police radio, crouched down

behind a patio partition at an apartment complex." In addition, two other officers had actually observed defendant in the act of the burglary, and "[h]e fled on foot." Id.

Therefore, here, where the police asked Mr. McCargo not a single question before forcing him to put his hands on the hood of their car, did not gather sufficient evidence to move their quantum of information to "Level Three"; hence they could not -- under New York law -- frisk him or take him someplace for a show up. They had only enough information to ask Mr. McCargo questions and to allow an opportunity for their suspicions to grow. New York law does not countenance seizing people off the street absent a description or other evidence of particularized suspicion -- and without making any inquiry of the defendant.

#### **CONCLUSION**

For the foregoing reasons, this Court should affirm the district court's decision to suppress the evidence as the product of an unconstitutional search and seizure.

Dated: New York, New York  
April 14, 2006

Respectfully submitted,

FEDERAL DEFENDERS OF NEW YORK, INC.  
APPEALS BUREAU

By:

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**CERTIFICATE OF COMPLIANCE**

I certify that this Brief contains 7,111 words in monospaced (courier new) typeface.

Dated: New York, New York  
April 14, 2006

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**DARRELL B. FIELDS**

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**CERTIFICATE OF SERVICE**

I certify that a copy of this Amicus Curiae Brief on behalf Dustin L. McCargo has been served by Federal Express on the United States/W.D.N.Y.; Attn.: **JAMES KENNEDY, ESQ.**, Assistant United States Attorney, 138 Delaware Street, Federal Center, Buffalo, New York 14202.

Dated: New York, New York  
April 14, 2006

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**DARRELL B. FIELDS**

**ANTI-VIRUS CERTIFICATION FORM**

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: UNITED STATES v. DUSTIN L. McCARGO

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