IN THE

# DISTRICT OF COLUMBIA COURT OF APPEALS

**Nos. 95-CF-885**

**Reginald V. Upshur,**

*Appellant*,

V.

**United States,**

*Appellee*.

**On Appeal from**
**The Superior Court of the District of Columbia**
**Criminal Division — Serious Misdemeanors Branch**
**No. F 106-95**

## Brief of Appellant

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## QUESTIONS PRESENTED

1. Whether police had probable cause to arrest Appellant, or even articulable suspicion to stop him, when they seized him and began searching for evidence of a crime, in light of the fact that they had observed only a one-way exchange of currency and saw nothing prior to the seizure tending to indicate that he possessed either narcotics or a weapon?
2. Whether Mr. Upshur was entitled to a jury trial because the crime of possession of crack cocaine is not a "petty" crime and, even if he was not entitled to a jury trial, whether the Trial Court's actions in the evidence suppression hearing: demonstrating favoritism toward the prosecution, assuming facts favorable to the Government that were not in evidence, refusing to consider evidence contradictory to testimony of the sole government witness, and noting the superior credibility of that witness prior to trial, denied Appellant a fair trial by an impartial adjudicator in violation of the Sixth Amendment and the Due Process Clause of the Fifth Amendment?

**IN THE DISTRICT OF COLUMBIA COURT OF APPEALS**

| | |
|---|---|
| **REGINALD V. UPSHUR,**<br>**APPELLANT,**<br>VS.<br>**UNITED STATES,**<br>**APPELLEE.** | No. 95-CF-885<br>(F 106-95) |

# BRIEF OF APPELLANT

## STATEMENT OF THE CASE

Appellant Reginald V. Upshur was arrested at about 11:30 p.m., January 4, 1995 in the 1500 Block of D Street, S.E. He was charged with possession with intent to distribute crack cocaine in violation of D.C. Code § 33-541(a)(1), and was presented in D.C. Superior Court on that charge the following day. R. 6. [1]

The Government subsequently reduced the charge to possession of a controlled substance, cocaine, in violation of § 33-541(d), and Mr. Upshur was arraigned on that charge at a status hearing February 1, 1995. R. 8. At a subsequent status hearing March 3, the case was set for a nonjury trial May 18. R. 2.

Trial Counsel filed a timely Motion to Suppress Evidence March 27, R. 22-26, and received no response from the Government. On the day of trial, Counsel made a verbal motion pursuant to D.C. Crim. R. 47-I(c) that the Court treat the motion as conceded by the Government. Tr. 4. The Prosecutor responded that the motion was not in his file, and did not offer any explanation of why he did not have a copy or assert that Defense Counsel failed to serve a copy of the motion. Trial Counsel argued strenuously that if the Court was not inclined to treat the suppression motion as conceded it should order the Government to respond in writing and set a new trial date. Trial Counsel argued that "We would ask the court . . . to give the defense enough

[1] "R." refers to the record on appeal. "Tr." refers to the 76-page transcript of the motions hearing and bench trial May 18, 1995.

time to look at the response, to read the response, read the case law and see if there are any facts in there that require additional investigation in this case." Tr. 6.

After stating he understood the Government "didn't forego a response out of indifference or because you didn't feel it was necessary, but rather, because you didn't have a copy of the motion?", the Judge found that "There are extenuating circumstances." Tr. 5-6. He refused to deem the motion conceded or to order a written response, and said he would hear testimony on the suppression motion. Tr. 6.

The Government assured the Court that

> on the back of the [PD] 163 is a narrative of the events and I would expect that the witness would testify exactly as was stated here, which gives the probable cause in that the defendant was seen leaning into a car, exchanging money. When a scout car — it was marked as scout car — was observed, came into view, the defendant saw that and began to walk away rapidly. He balled his hands up into a fist. Again, money could be seen and —

Tr. 7. The Government then called Ofc. Jed D. Worrell as its only witness to testify as to probable cause to stop Mr. Upshur, but Ofc. Worrell did not corroborate the Government's recitation from the PD 163.

After a lengthy colloquy with Trial Counsel, and to a much lesser extent the Government, the Court denied the suppression motion. Tr. 30-51.

The truncated trial followed immediately. Before beginning, in response to an inquiry from the Judge, the Prosecutor indicated that he would recall Ofc. Worrell to establish the chain of custody of the physical evidence, but that he did not intend to reintroduce testimony aired in the suppression hearing. Tr. 51-52. Defense Counsel stated that he had cross-examined Ofc. Worrell at the hearing only on issues relevant to the motion, and that he wanted free reign to cross-examine the witness on issues relevant to guilt, except as to "where he was that night at that time, any factual issues." Tr. 52. The Judge said Defense Counsel could ask additional questions and "you can tell me you feel that you need further direct evidence, whatever." *Id.*

There were no opening statements, and the Government recalled Ofc. Worrell. After he testified, the Government rested and Mr. Upshur was the only defense witness. The Government

submitted on the evidence, Tr. 69, and Defense Counsel made a final argument. The Trial Court issued a general finding of guilt, based largely on testimony at the suppression hearing. Tr. 70-71.

The case was continued for sentencing June 26, 1995, when Mr. Upshur was ordered to pay a $500 fine plus the $10 assessment for the crime victims' fund. R. 27, 30. Mr. Upshur filed a timely Notice of Appeal July 10. R. 31.

## STATEMENT OF FACTS

### OFC. WORRELL'S TESTIMONY AT THE SUPPRESSION HEARING

Ofc. Worrell testified that he and Ofc. Seth Weston were driving south on 16th Street, S.E. at about 11:35 p.m. January 4, 1995. Tr. 10. As they reached the intersection of 16th and D streets, Ofc. Worrell saw Mr. Upshur standing beside the driver's side of a car parked in the 1500 block of D Street, and it appeared to him that Mr. Upshur was giving the driver some money. Tr. 11-12. Initially, Ofc. Worrell testified that he was about 15 feet from the parked car when he saw this one-way transaction. Tr. 12.

Mr. Upshur was slightly bent over and reaching into the car, and when he saw the marked cruiser he walked away from the vehicle with his hands balled into fists, according to Ofc. Worrell. Tr. 13. The officer said he could not see what, if anything, was in Mr. Upshur's hands as he walked away, but it appeared that the money the officers had seen earlier remained with the driver. Tr. 13-14. The officer explained that "it was my contention, based on the money changing hands, him pulling his hand away from the car, and then his walking or attempting to walk away as soon as he observed the police . . . that it could have been a possible narcotics transaction that took place." Tr. 14.

The two officers drove their cruiser close to the other car, got out, stopped Mr. Upshur "and pull[ed] him and tr[ied] to place his hands on the car. . . . [T]he fist was still balled, so we also attempted to tell him to . . . open up his hand," Ofc. Worrell stated. Ofc. Weston attempted to make Mr. Upshur stand still and stop "fidgeting," and to place his hands on the cruiser. Tr. 15.

Then Ofc. Worrell turned to the driver of the parked car, who sped away. *Id.* When Ofc. Worrell turned his attention back to Mr. Upshur, Ofc. Weston was attempting to reposition him near the cruiser. Ofc. Worrell stated that he saw several objects falling from Mr. Upshur's hand. Tr. 16. The officer said he found three ziplock bags of a white substance on the ground, which tested positive for cocaine. *Id.*

On cross examination Ofc. Worrell said he saw the transaction from 16th Street, before the cruiser turned right onto D Street. Tr. 18. He admitted that the car may have been as far as one-

quarter of a block away, not 15 feet, when he first saw what he believed to be money changing hands. Tr. 20, 22. When Defense Counsel asked whether Ofc. Worrell saw Mr. Upshur receive money, the witness responded: "No sir. . . . I saw what looked as if there was some type of exchange of money." Tr. 24.

> Q. What did you do then?
>
> A. At that point we crept around the corner and . . . we parked across from the vehicle. . . . At that time we both jumped out of the vehicle and that's when we grabbed Mr. Upshur.
>
> . . .
>
> That's when we grabbed Mr. Upshur, after he started walking away.
>
> Q. He started to walk away first?
>
> A. That's correct sir.

*Id*. Ofc. Worrell added that Mr. Upshur took only a few steps before he was stopped, "he just kind of turned partially and started walking away from the vehicle, just a few steps." Tr. 27.

The officer went on to say he did not see money in Mr. Upshur's hand as he walked away, Tr. 24-25, but admitted that, in the PD 163, Ofc. Weston had reported seeing Mr. Upshur clutching money as he moved away from the parked car. Tr. 27.

**OFC. WORRELL'S TESTIMONY AT TRIAL**

The Government recalled Ofc. Worrell to testify at the trial, but on direct examination it asked only questions aimed at placing the narcotics and the drug analysis report in evidence. Tr. 52-54.

On cross examination, Ofc. Worrell stated that he grabbed Mr. Upshur, "slid him over and handed him right to Officer Weston in my attempt to start dealing with the subject seated in the vehicle." Tr. 55. Then the other vehicle left the scene.

Ofc. Worrell gave conflicting testimony about his actions immediately before he claims to have seen something fall from Mr. Upshur's hand.

> Well, at that point, it happened so fast, he sped away, and at that point I turned, and I remember that Officer Weston was — had told the defendant several times, like I said, to

place his hands on the car.

And he had problems — Officer Weston was trying to move him from one portion of the vehicle down, okay, and as he was pulling him down — actually *what I did was I kept my hands on his hands* and that's when I actually saw something drop from his hand.

Q. So is it your testimony that your hands were on his hands at the time that you saw something drop from his hands?

A. No, sir. As I was turning away and went to grab him, Weston was pulling him down, and as he was moving I saw what we call a dropsy. In other words, I saw something fall from his hand to the ground, a dropsy.

Tr. 57 (emphasis added).

**MR. UPSHUR'S TESTIMONY AT TRIAL**

Mr. Upshur testified that he had been at a dance club that evening and, shortly before his arrest, had dropped off a female friend at her home on D Street. As he was leaving the woman's house the man in the car, with whom Mr. Upshur played ball, called him over and told him about an acquaintance who had been killed in a traffic accident. Tr. 60. He had been standing next to the driver's side of the car and, as he turned to walk away, the police car rounded the corner and the officer who was driving told him to approach the cruiser. Tr. 61.

The officer, whom he identified as "not the officer that was here [in court]," told him to place his hands on the hood of the cruiser and then searched him, taking everything out of his pockets. As Mr. Upshur was putting his belongings back in his pockets Ofc. Worrell came around from the passenger side of the cruiser and told the driver of the parked car to get out of his vehicle, and the car sped off. As it did, it almost hit Mr. Upshur and one of the officers. Angered by this event, the officers demanded that Mr. Upshur tell them the driver's name. When he said he only knew the man as "Tank," "the officer that was behind me told me he saw some bags on the ground, that's when he turned to me, he said, well, they're yours, if you don't know who it is, you can't help me, I can't help you." Tr. 62-63.

He said Ofc. Worrell recovered the bags of crack from the ground near where the car had been before it sped away. Tr. 64. Mr. Upshur said he was across the street, near the cruiser at the time and that he did not have any narcotics in his possession that night. Tr. 65.

On cross-examination, Mr. Upshur said the cruiser stopped several car-lengths from the parked car, that he had walked to the cruiser in response to Ofc. Weston's order, and he was there for several minutes before Ofc. Worrell addressed the driver of the parked car. Tr. 67-68.

## SUMMARY OF THE ARGUMENT

### POLICE VIOLATED MR. UPSHUR'S FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEIZURE AND SEARCH

After observing Mr. Upshur talking to a man seated in a parked car, and a one-way transfer of money, police seized Appellant and began searching for evidence of a crime. To justify the search as being incident to a valid arrest, the officers needed to have probable cause to believe that a crime had been committed. But, at the time of the seizure, which occurred when Ofc. Worrell grabbed Mr. Upshur's arm, police did not even have articulable suspicion to believe that a he had been involved in a narcotics transaction.

Even if the seizure amounted to no more than a *Terry* stop, the actions of the police officers violated Mr. Upshur's Fourth Amendment protection against unreasonable search and seizure for two reasons. First, none of the factors cited by the Trial Court, even when considered cumulatively, gave the officers reasonable, articulable suspicion. Second, even if they had sufficient grounds to stop and question Mr. Upshur, they had no reason to believe that he was armed and, therefore, their efforts to force him to reveal the contents of his balled fists were unconstitutional.

In many cases this Court has enumerated factors relevant in determining whether a police officer in a particular situation had reasonable, articulable suspicion to warrant a seizure or search. The common thread running through the cases is that an officer who witnesses an exchange between two individuals must either see a two-way exchange of currency for some object, or see one of the suspects retain an object that the officer has reason to believe is narcotics or a weapon. In this case, Ofc. Worrell testified that he saw currency exchanged and nothing else and, although he saw Mr. Upshur ball his hands, Appellant could not have concealed a weapon in his fist.

The fact that the driver of the car sped away after Mr. Upshur was seized is irrelevant to the question of whether police had the requisite grounds for the seizure, because a seizure must be constitutional at its inception. Similarly, Mr. Upshur's refusal to show the officers what he was

holding and the discovery of three ziplock bags of crack on the ground cannot support the seizure or the officers' efforts to force him to open his hand.

This Court has repeatedly ruled that the reputation of an area for narcotics trafficking is of minimal relevance in determining whether police had articulable suspicion justifying a seizure. Even taking all of these factors together, based on observation of a one-way exchange of money these officers did not have reasonable, articulable suspicion to seize Mr. Upshur and search him, and they certainly lacked probable cause to arrest him when Ofc. Worrell grabbed his arm.

**MR. UPSHUR'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED**

The D.C. City Council voted in 1994 to reduce the sentences for most misdemeanors, including possession of crack cocaine, to 180 days or less in the mistaken belief that doing so would permit it to eliminate jury trials for those offenses. But, because the Council did not designate the offenses "petty offenses," and its debate of the changes indicates that it considers those offenses at least as serious now as it did before, the measure unconstitutionally deprived Mr. Upshur of a jury trial.

During the evidence suppression hearing the Trial Court exhibited favoritism for the Government in several ways. Even though the Government could offer no good cause for its failure to respond to the motion to suppress, the Trial Court refused to either deem the motion conceded or order a written response. Then, the Government asserted that its evidence at the hearing would be the same as the statement in the PD 163, but the testimony of its witness conflicted with the written report in significant respects. Despite this conflict the Court ruled that police had reasonable, articulable suspicion to stop Mr. Upshur and refused to suppress the evidence.

Finally, in the suppression hearing, the Judge asserted his strong confidence in Ofc. Worrell's credibility, despite the conflict between his testimony and the contemporaneous written account of the incident prepared by Ofc. Weston. Once the suppression hearing was completed the Judge had a firm opinion that Mr. Upshur was guilty, and the trial that followed was but a formality in which the defense had no effective means of overcoming the prejudice.

## ARGUMENT

### THE SEIZURE AND SEARCH OF MR. UPSHUR VIOLATED THE FOURTH AMENDMENT BECAUSE POLICE LACKED EVEN ARTICULABLE SUSPICION WHEN THEY ARRESTED HIM AND BEGAN SEARCHING FOR NARCOTICS

There is no question that Mr. Upshur was seized in Fourth Amendment terms when Ofc. Worrell grabbed his arm. *See Duhart v. United States*, 589 A.2d 895, 898 (D.C. 1991)(use of physical force by police officer is intimidating circumstance indicating seizure). Ofc. Weston's subsequent repeated attempts to force Mr. Upshur to stand with his hands atop a police cruiser and demands that he open his hands and show officers what he had in them were "serious intrusion[s] upon the sanctity of the person" and confirmed that he was not free to leave. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *See, also, Hawkins v. United States*, 663 A.2d 1221, 1229-30 (D.C. 1995)(Farrell, J. concurring)(repetition of demand by police officer clear indication to suspect interaction with officer no longer voluntary).

The Government conceded in opposing the motion to suppress that police had made a *Terry* stop, but asserted that their actions were based on reasonable, articulable suspicion, Tr. 44, and the Trial Judge agreed that a *Terry* stop occurred when Ofc. Worrell grabbed Mr. Upshur's arm. Tr. 46. In reality Mr. Upshur was under arrest when Ofc. Worrell grabbed him. *See Howell v. United States*, 434 A.2d 413 (D.C. 1981).

#### *STANDARD OF REVIEW*

This Court's role in reviewing a Fourth Amendment challenge to the admissibility of evidence is to ensure that the Trial Court had a substantial basis for concluding that police did not violate Appellant's constitutional rights January 4, 1995, when they arrested him and conducted a custodial search for drugs. *Brown v. United States*, 590 A.2d 1008, 1020 (D.C. 1991). "Whether reasonable suspicion or probable cause exists to justify a seizure is a mixed question of fact and law. The findings with respect to the historical facts are reviewed under the clearly erroneous standard; the ultimate conclusion, however, is subject to *de novo* review." *United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir. 1988)(citing *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5, 100 S.Ct. 1870, 1875-76 n. 5, 64 L.Ed.2d 497 (1980)).

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental — i.e., constitutional — criteria established by this Court have been respected.

*Ker v. California*, 374 U.S. 23, 34, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

### *POLICE LACKED PROBABLE CAUSE WHEN THEY ARRESTED MR. UPSHUR AND BEGAN SEARCHING FOR EVIDENCE*

When the two police officers exited their cruiser and approached Mr. Upshur they were intent on finding evidence of the "possible narcotics transaction" Ofc. Worrell believed had taken place. Ofc. Worrell grabbed Mr. Upshur by the arm and handed him off to Ofc. Weston, who then tried for some time to move Mr. Upshur from one position to another and to place his hands on the cruiser. All the while, the focus of attention was on Mr. Upshur's balled up right hand, in which nothing was visible, according to Ofc. Worrell's testimony on direct examination in the motion hearing. Tr. 14.

> [W]e proceeded to stop the defendant and to pull him and try to place his hands on the car. . . . [W]e noticed that — at least that the fist was still balled, so we also attempted to tell him to, you know, open up his hand. And my partner, Officer Weston, tried to cause the defendant to remain stationary, in other words, the defendant was fidgeting around a lot and [Ofc. Weston] attempted to place his hands on the parked scout car.

Tr. 15. Then, during cross examination at the trial, Ofc. Worrell stated that during this struggle he was gripping Mr. Upshur's right hand until Appellant dropped what was in it. When that happened, the search abruptly ended, according to Ofc. Worrell, who said "we put his hands on top of the car. And at that point, when we recovered the narcotics on the ground, he was placed under arrest." *Id*.

A warrantless search of a person to obtain evidence of a crime is permissible under the Fourth Amendment only if the person has been lawfully arrested. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) , *Preston v. United States*, 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), *United States v. Rabinowitz*, 339 U.S. 56, 60, 70 S.Ct. 430, 94 L.Ed. 653 (1950), *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145 (1925), *Carroll v. United States*, 267 U.S. 132, 158, 45 S.Ct 280, 69 L.Ed. 543 (1925), *Weeks v. United*

*States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914). As the Supreme Court has stated repeatedly:

> Whether that arrest was constitutionally valid depends in turn upon whether *at the moment the arrest was made*, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

*Beck, supra*, 379 U.S. at 91 (emphasis added)(citations omitted).

In *Howell, supra*, this Court held that police converted a consensual encounter with a suspect into an arrest by grabbing a leather pouch from his pocket and opening it, and that they lacked probable cause to believe he was carrying narcotics when they did so. 434 A.2d at 414. Prior to the arrest police had observed Howell in an area known for drug trafficking take a leather pouch from his coat pocket, remove a manila envelope from it, hold it to his nose as though he was sniffing it, and then hand it to another person who walked away with the envelope. 434 A.2d at 413-4. The officer, who claimed such envelopes contained marijuana in 99 percent of the cases with which he was familiar, drove up to Howell and asked him to remove the pouch from his pocket. When he refused, the officer took the pouch and opened it, discovering two more envelopes containing marijuana. Applying reasoning similar to that of the Trial Court in Mr. Upshur's case, the Superior Court denied Howell's motion to suppress, concluding that "one may assume when he's been involved in one transaction . . . it's probable to believe . . . he had more on him." *Id.*, at 414.

This Court rejected that finding, noting that "The decisions upholding arrests for the possession of prohibited substances have rested upon the police observing one of two things before they effected the arrest: either the suspect exchange the suspected drugs for money, or the suspect retain upon his person the suspected drugs." *Id.* Noting that "The government urges us . . . to uphold the arrest for possession of narcotics in this case solely on the basis of the police observing appellant in an area of high narcotics activity with a manila envelope of a type 'normally used to package marijuana' in his possession at a point in time prior to his arrest." The Court refused to find probable cause "where the officers observed the suspect neither exchange

the envelope for money nor retain any other item that reasonably appeared to be drugs." *Id.*, at 415.

If grabbing the pouch from Howell's pocket constituted an arrest, grabbing Mr. Upshur's arm and demanding that he submit to police control is no less an intrusion on his personal security; Mr. Upshur was under arrest when Ofc. Worrell grabbed him. Neither officer attempted to initiate a consensual contact, or asked him any question before attempting to immobilize him. They never saw him in possession of a weapon, and Ofc. Worrell's description clearly demonstrates that the balled hand from which nothing was protruding could not have concealed one. Furthermore, Ofc. Worrell never testified that he had reason to believe Mr. Upshur was armed or that either officer was concerned for his safety, and the fact that the search ended as soon as he recovered the drugs strongly suggests the contrary. *See Lewis v. United States*, 486 A.2d 729, 733 (D.C. 1985).

But, the Judge did not conclude that the two police officers had probable cause to make an arrest at that point. Instead, he stated that:

> it seems to me under the circumstances here, the officer was in a sense relieved of the responsibility of justifying his next move at the point where he saw the defendant drop the contraband.
>
> So regardless of what he had in mind, what questions he was going to put, or how he was going to conduct the search or pat down, or just what he had in mind as I see, the probable cause escalated, I think it exploded in front of him, there he saw the contraband being discharged by the defendant.
>
> . . .
>
> . . . as it turns out the police's intention, . . . what they were expecting to do was overwhelmed or overtaken by a new development, which is to say your client's discarding the contraband.

*Id*., at 47-48.

Thus, the Trial Court attempted to finesse the probable cause requirement by concluding that several events — the seizure, the driver's rapid departure, and the "dropsy" — occurred in the same instant, and that Mr. Upshur voluntarily discarded the narcotics in hopes of avoiding detection. In reality, the arrest, based on Ofc. Worrell's observation of a one-way transfer of currency, but no drugs or other contraband, and his subjective belief that a drug transaction could

possibly have taken place, set off the chain of events that produced the concrete facts needed to justify an arrest. Ofc. Worrell conceded that the driver of the car did not speed away until after he had grabbed Mr. Upshur and handed him off to Ofc. Weston, and Ofc. Worrell did not see the ziplocks until after Ofc. Weston repeatedly ordered Mr. Upshur to open his hands and both officers physically attempted to make their suspect show them what he was holding.

The Trial Court conceded that police lacked probable cause to make the arrest until Ofc. Worrell saw the packets of crack cocaine. Tr. 47. But the officers' actions can be justified, if at all, only if they were engaged in a search incident to a valid arrest. In effect, the Trial Court "justif[ied] the arrest by the search and at the same time [] justif[ied] the search by the arrest," which cannot be sanctioned under the Fourth Amendment. *Johnson v. United States*, 333 U.S. 10, 16, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

### *EVEN IF THE ENCOUNTER WITH MR. UPSHUR IS VIEWED AS A* TERRY *STOP, POLICE LACKED ARTICULABLE SUSPICION JUSTIFYING THE SEIZURE AND THE SEARCH*

There is no question that Mr. Upshur was seized for Fourth Amendment purposes when Ofc. Worrell grabbed him by the arm. At a minimum, to justify the seizure under the Fourth Amendment "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry, supra*, 392 U.S. at 21. As in *Terry*, the crux of this case is not in the propriety of the officers' decision to investigate what they believed to be suspicious activity. Rather, it is in the propriety of their seizure of Mr. Upshur and attempt to search him. *Id.*, at 23. Under *Terry*, the Court is required to make two separate determinations because even if police have articulable suspicion to stop and question a suspect, they do not automatically have grounds for a frisk. The latter is permissible only where the officer "has reason to believe that he is dealing with an armed and dangerous individual," and "is not justified by any need to prevent the disappearance or destruction of evidence of crime." *Id.*, 27-29.

In determining whether the seizure was unreasonable this Court must inquire into "whether the officer's action was justified at its inception, and whether it was reasonably related

in scope to the circumstances which justified the interference in the first place." *Id.*, at 20. This Court has enumerated several factors which trial judges may consider in making this determination, and the Trial Court referred to several of them in concluding that the seizure and search of Mr. Upshur did not violate the Fourth Amendment. Among them were police observation of a one-way transfer of money and Mr. Upshur's hand balled into a fist, Mr. Upshur's movement away from the parked car when the cruiser came into view, the neighborhood's reputation as a high narcotics trafficking area, and the rapid departure of the parked car after Ofc. Worrell seized Mr. Upshur.

None of these factors taken individually or collectively would support a finding that police had reasonable, articulable suspicion to seize Mr. Upshur when Ofc. Worrell grabbed his arm.

**The One-Way Transfer of Money**

This Court has ruled repeatedly that observation of one person giving or showing an object to another is insufficient to create probable cause. *See Haywood v. United States*, 584 A.2d 552 (D.C. 1990); *Howell, supra*, 434 A.2d 413; *Vicks v. United States*, 310 A.2d 247 (D.C. 1973). And it has similarly concluded that such activity does not arouse articulable suspicion. *Duhart, supra* 589 A.2d 895.

During argument concerning the suppression motion, the Trial Judge agreed with Counsel that Ofc. Worrell had testified that he witnessed a one-way transfer of money between Mr. Upshur and the driver of the parked car. But, when confronted by Trial Counsel with the fact that no precedent in this jurisdiction supported a finding of articulable suspicion based on a one-way transfer, which the Government did not refute, the Trial Court stated:

> [D]id not Officer Worrell talk to an exchange, a two-way transfer you might say, because not only does he say he saw money pass from the defendant to the car driver, but he saw the defendant leave with his fists balled up after that, so that the officer in a sense presents an inferential case, a circumstantial case of something having been exchanged.
>
> He said after all, he said, I didn't know what was going on, he said, maybe it was a narcotics sale, he said, it was my contention, I think he meant my suspicion you see, because he sees money going in one direction, and he doesn't see what comes in the other direction, but he does see as he approaches the defendant running off with his fists balled

up.

> And I don't think it's unreasonable — I conclude that it is not unreasonable for the policeman to believe that the defendant had something in his hand that he didn't want to lose and he didn't want the officer to see. And I conclude further it was fair for the — it was reasonable for the officer who has had some experience in a high narcotics area to believe that what was in the defendant's hand as he walked briskly away from the police was narcotics which he had received for money, he was just paying the driver of the car for money (sic).

Tr. 38-39. It is noteworthy that the Trial Court found that Ofc. Worrell believed Mr. Upshur was holding narcotics in his hand, not a weapon.

In *Duhart*, a police sergeant with 18 years of experience, including six on the vice squad, in an area know for narcotics trafficking, observed two men he did not know from a distance of 25 feet as one showed something to the other. The officer did not know what the object was, but he believed he had observed a narcotics transaction. As the sergeant approached, one man put the object in his pocket and the men began walking in opposite directions. *supra*, 589 A.2d at 895. Duhart stopped in response to a verbal request, but only reluctantly withdrew his hand from his pocket when the sergeant demanded to know what he was hiding. The officer then grabbed Duhart by the wrist and decided to frisk him because he "began to act a little funny . . . [and] stiffened his body up and refused to stand so that [the sergeant] could pat him." *Id.*, at 896. In the ensuing search, the sergeant found a gun on Duhart's right side.

The Court reversed Duhart's conviction, concluding that "There is nothing 'unusual' or even mildly 'suspicious' about such activity (one person showing something to another), which must occur as a matter of course between individuals every day, and there are innumerable innocent explanations for such behavior." *Id.*, at 899. It went on to note, as is true in Mr. Upshur's case as well, that the object observed did not appear to be drugs, and there was no "particularized fact from which the sergeant could conclude that what transpired had some connection with drugs." *Id.*

In *Haywood, supra*, a sergeant with 13 years of experience, who had made 300 to 400 drug arrests, observed Haywood from a distance of about 22 feet as he handed currency to a man named Tate and received nothing in return. 584 A.2d at 553. The sergeant and three other officers had gone to the area in response to a lookout from a member of the Narcotics Task Force that a

man matching Tate's description was holding drugs for distribution at a specified location. When Tate saw members of the "jump out" squad approach, the two men began walking in opposite directions. The two suspects were stopped simultaneously and police discovered a large quantity of dilaudid tablets in Haywood's possession and only money in Tate's. *Id.* The Court concluded in part that

> the handing of money by one person to another person, standing alone, cannot give rise (in any neighborhood) to the implication that there is criminal activity afoot sufficient to give rise to probable cause to arrest. Furthermore, we cannot justify appellant's seizure factually or legally on the ground that the arresting officer thought that appellant was a customer . . . or otherwise connected to Tate.

*Id.*, at 556. *See, also, Vicks supra,* 310 A.2d at 249 ("no 'two-way exchange' and no 'plain view' of [narcotics] . . . [t]hus, there existed no probable cause to arrest appellant and seize the handkerchief" found to contain drugs.).

Nearly 10 years earlier, the Court ruled that a one-way transfer of an object, a manila envelope, did not provide probable cause to believe that a suspect was distributing marijuana and reversed the conviction in *Howell, supra.*[2]

**Mr. Upshur's Refusal To Show Officers What Was in His Hand**

Giving or showing an unidentified object to another person does not rise to the level of articulable suspicion if the suspect subsequently refuses to show the object to an inquiring police officer. *See Anderson v. United States*, 658 A.2d 1036 (D.C. 1995); *Green v. United States*, 662 A.2d 1388 (D.C. 1995); *Brown v. United States*, 590 A.2d 1009 (D.C. 1991).

In this case the Trial Court found significant in ruling on the suppression motion that Mr. Upshur balled his hands into fists and would not show officers what he was holding. But his refusal to open his hands cannot be considered in deciding whether the officers had probable cause justifying arrest or even articulable suspicion justifying a *Terry* stop because it occurred after he was seized and the officers could not have been certain when Ofc. Worrell grabbed his arm that he would resist their efforts to recover drugs from him.

[2] For a detailed discussion of *Howell* see pgs. 12 - 13 above.

In *Duhart* and *Howell*, *supra*, where the initial encounters between police and suspects were consensual, this Court refused to hold that the suspect's refusal to show investigators objects rendered seizures constitutional. Recently, in *Anderson, supra*, which the Court found factually very similar to *Duhart*, it reversed the conviction, concluding that the defendant's reluctance to remove his hands from his pockets and his nervousness did not provide articulable suspicion justifying the frisk that turned up a loaded .32 cal. handgun. Prior to the encounter police had seen Anderson and another man in the back yard of a house late at night. When the men saw a police cruiser, Anderson walked away quickly and police stopped the other person, who told them neither man lived nearby and the men were just talking. When police spotted Anderson five minutes later, one of them drove up to him, asked him to approach, and asked him questions. The officer asked him to take his hands out of his pockets and, in response to a question about what he had been doing in the yard, Anderson denied that he had been there. When Anderson put his hands back in his pockets, the officer again asked him to remove them, and Anderson "seemed increasingly nervous and wide-eyed, and began rocking back and forth." *Id.*, at 1037. At that point the officer decided to frisk him and discovered a revolver in his pocket.

The Court analyzed several prior decisions in which it affirmed convictions and held that none of them applied. It stated:

> The officer did not observe criminal activity, was not responding to a report of criminal activity, nor was he following-up on an informant's tip. There was no bulge or object being concealed that the officer could think was a weapon as in *Peay* [*v. United States*, 597 A.2d 1318 (D.C. 1991)] and *Crowder* [*v. United States*, 379 A.2d 1183 (D.C. 1977)], nor was there an admission of past weapons use in a criminal activity as in [*United States v.*] *Barnes*[, 496 A.2d 1040 (D.C. 1985)].

658 A.2d 1040. In *Green*, *supra*, the Court went a step further, holding that an officer who sees a suspect place something in his pocket, which the officer cannot identify as a weapon, does not have articulable suspicion to seize and frisk the suspect. 662 A.2d at 1391.

**Walking Away When Police Arrived**

In his colloquy with counsel the Trial Judge repeatedly referred to Ofc. Worrell's testimony that when the cruiser came into view Mr. Upshur walked away from the parked car,

and that fact clearly was significant to his finding that the officers had articulable suspicion justifying a *Terry* stop. He said: "That he came upon the defendant bending over a car pulled up against the curb and the car sped off almost at once. The defendant stepped back from the car almost at once and walked away from the police clutching something in his hand. . . ." Tr. 33. *See, also*, Tr. 35, 37. He eventually said, "I conclude further it was fair for the — it was reasonable for the officer who has had some experience in a high narcotics area[3] to believe that what was in the defendant's hand *as he walked briskly away from the police* was narcotics which he had received for money, . . ." Tr. 39 (emphasis added). He made a similar statement about Mr. Upshur walking "briskly away" after denying the motion. Tr. 49.

But Ofc. Worrell testified that Mr. Upshur took only a few steps before police grabbed him, and that his pace was a walk. Prior to the discussion at the conclusion of the motions hearing, the only person to have said Mr. Upshur's pace was greater than a walk was the Prosecutor, when he argued that the Court should proceed with the motions hearing even though he had not filed a written response to the suppression motion. In recounting the statement on the PD 163, he said "When the scout car, this marked scout car was observed, came into view, the defendant saw that and began to walk away rapidly." Tr. 7. In fact, the PD 163 merely states that "when the scout car was observed def. immediately began to walk away," but says nothing about the speed at which he departed.[4]

Even if the evidence supported the Trial Court's finding concerning Mr. Upshur's efforts to avoid police, it is irrelevant to the inquiry into whether they had grounds for a stop or an arrest. As recently as August, this Court reiterated its long-standing position that a person has the right to avoid contact with police and such efforts do not generally contribute to a finding of articulable

[3] The Government never attempted to establish that Ofc. Worrell had special knowledge of narcotics transactions or experience uncovering such crimes. He testified that he had been on the force approximately three years and was on patrol duty in uniform January 4, 1995. Tr. 9-10. In contrast, the sergeant who made the stop in *Duhart* had 18 years of experience, including six years on the vice squad. 589 A.2d at 896 n. 2. The sergeant who testified in *Haywood* was part of a Narcotics Task Force "jump out" squad. 584 A.2d at 553. The officer in *Howell* was apparently engaged "in making observations through binoculars from an unmarked car 'on suspected narcotics dealings' in the southeast area of the city," although the opinion did not detail his experience. 434 A.2d at 413.

[4] Def. Exh. 1. An identical statement is included in the *Gerstein* filed January 5, 1995 in support of the complaint in F 106-95. R. 13.

suspicion. *Green, supra*, 662 A.2d at 1391. In that case police, responding to reports that shots had been fired, had stopped several suspects and ordered them to lie on the ground. One of the officers saw Green emerge from a nearby building and, when he saw police, put a dark object in his pocket and retreat into the building. The officer followed, and found Green hiding in the basement of the building "peeping" at the officer. *Id.*, at 1389. Relying on *Anderson* and *Smith (John H.) v. United States*, 558 A.2d 312 (D.C. 1989)(*en banc*) the Court reversed the conviction. *Green, supra*, at 1392.

The Court said in *Smith* that "leaving a scene hastily may be inspired by innocent fear, or by a legitimate desire to avoid contact with the police. A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention." *Id.*, at 316. (citing *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983)). The Court noted that its decisions in which flight was a factor in determining that police had articulable suspicion involved defendants who saw police and "reacted by immediately running from the scene of the alleged crime." *Id.*, at 317.

> For flight to suggest consciousness of guilt—a mentality other than a legitimate desire to avoid the police—that flight not only must be very clearly in response to a show of authority but also must be carried out at such a rate of speed . . . or in such an erratic or evasive manner that a guilty conscience is the most reasonable explanation.

*Id.*, at 319 (separate majority opinion by Ferren, J.). *See, also*, *Duhart, supra*, 589 A.2d at 900; *Haywood, supra*, 584 A.2d at 556.

There is no evidence that Mr. Upshur bolted when he saw police; he merely walked away, according to Ofc. Worrell.

While the rapid departure of the parked car might be viewed as flight indicating the driver's consciousness of guilt, for two reasons that event cannot impute consciousness of guilt to Mr. Upshur as a means of demonstrating articulable suspicion. First, Mr. Upshur was seized well before the driver sped away. Although Ofc. Worrell testified that the car left the scene almost immediately, the account of the incident in the *Gerstein* statement and on the back of the PD 163 state that "Def. was stopped by the undersigned [Ofc. Weston], and Ofc. Worrell attempted to

stop the driver. The driver *started his vehicle* and drove directly at the undersigned and def. and was able to make good his escape." R. 13 (emphasis added). Thus, from a contemporaneous record of the event it appears that the car was parked with its motor off, and the driver had time to start the car, put it in gear and drive away after Mr. Upshur was seized and Ofc. Weston was demanding to see what was in his hands.

Furthermore, "one person's flight is imputable to another only if other circumstances indicate that the flight from authority implies another person's consciousness of guilt as well." *United States v. Johnson (Harvey L.),* 496 A.2d 592, 597 (D.C. 1985)(*en banc*). In *Johnson,* three men were sitting in a damaged car late at night, and when police asked the driver to approach, he ran to a nearby building. The Court concluded that the driver's flight, taken with other factors, provided articulable suspicion to stop the other two men and frisk them for weapons. But the Court noted that if "a police officer approaches two persons chatting at a bus stop and speaks to one of them who immediately runs away, there would be no basis, without more, for the officer to detain the person who remained." *Id*., at 597 n. 4 (citations omitted).

**High Narcotic Trafficking Area**

As the Court noted in *Smith, supra*,

> thousands of citizens live and go about their legitimate day-to-day activities in areas which surface . . . in court testimony, as being high crime neighborhoods. The fact that the events here at issue took place at or near an allegedly "high narcotics activity" area does not objectively lend any sinister connotation to facts that are innocent on their face.

558 A.2d at 316 (quoting *United States v. Bennett,* 514 A.2d 414, 419 n. 3 (D.C. 1986)(Mack, J., dissenting). *See, also, Anderson, supra,* 658 A.2d. 1040; *Duhart, supra,* 589 A.2d at 900; *Haywood, supra,* 584 A.2d at 556; *Howell, supra,* 434 A.2d at 414-5.

Ofc. Worrell testified that the area of 15th and D Streets, S.E., is a residential neighborhood where drug trafficking occurs regularly, but he did not testify that he had seen any drug transactions that night, or that any other individuals were even on the street at 11:30 p.m. January 4, 1995. The officers were not responding to a complaint or tip about drug trafficking in

that area, and neither Mr. Upshur nor the driver of the car was known to them as a drug dealer or addict. Thus, the character of the neighborhood should be given no weight in the *Terry* analysis.

**Cumulative Weight of Factors**

In all of the cases cited above this Court refused to find reasonable grounds for the stops and searches after evaluating the cumulative weight of several of these factors. The bottom line in all of them appears to be that if the officers did not see the defendant engage in specific criminal acts, the addition of the other factors — the character of the neighborhood, the time of day, avoiding contact with police, the experience of the officer — did not support a finding of articulable suspicion or probable cause.

Thus, if police saw a two-way transaction of money for some other object, or an object they could readily identify as narcotics or a weapon, this Court has ruled that police had the requisite justification for seizure and subsequent frisk or search. *See, e.g., Tobias v. United States*, 375 A.2d 491, 492 (D.C. 1977)(withdrawing objects from shoulder bag and giving them to others in return for money); *Peterkin v. United States*, 281 A.2d 567, 567-8, *cert. denied*, 406 U.S. 922 (D.C. 1971)(two-way transaction of "something" out of a vial for currency); *Munn v. United States*, 283 A.2d 28 (D.C. 1971)(counting and examining small "tinfoil packets" known to the officers as packaging frequently used for heroin); *Crowder*, *supra*, 379 A.2d at 1184-5 (likelihood that newspaper carried by participant in 4:30 a.m. craps game concealed weapon). The Court has similarly affirmed seizures of suspects whose voluntary statements or actions indicated the likelihood that they were armed, or consciousness of guilt. *See, e.g., Barnes, supra*, 496 A.2d at 1041 (suspect outside store at closing time told officer he had no business there and had previously been arrested for armed robbery); *Peay*, *supra*, 597 A.2d 1321-22 (when police arrived for raid, suspect hurriedly entered known crack house, seen clutching something officer believed was weapon, dropped narcotics when stopped).

In this case, taking Ofc. Worrell's testimony at face value, police saw only a one-way transfer of currency and had no reason to suspect that Mr. Upshur was armed. He moved away from the car at a walk as the police cruiser approached and his clenched fists could not have

contained a weapon. Police had no reports of drug trafficking in that area at the time, which was not an unreasonably late hour for someone to be on the street in a residential neighborhood.

When Ofc. Weston's contemporaneous written report of the stop and arrest is added, the absence of articulable suspicion for a seizure is even clearer. Ofc. Weston's statement that Mr. Upshur had money in his hand when he moved away from the car raises questions about Ofc. Worrell's credibility, or at least about the accuracy of his recollections five months after the arrest. Furthermore, his statement that the driver started his car and then fled after Mr. Upshur was seized strongly suggests that the chain of events following the seizure took longer than Ofc. Worrell described, and further reduces the likelihood that, at the instant of seizure, the officers had the requisite articulable suspicion to intrude upon Mr. Upshur's personal security.

## MR. UPSHUR WAS DENIED HIS RIGHT TO A JURY TRIAL GUARANTEED BY THE SIXTH AMENDMENT AND HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL ADJUDICATOR GUARANTEED BY THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

For the reasons articulated by the appellant and *amici* in *Burgess v. United States*, 95-CM-1352 (D.C. *argued before merits panel* November 30, 1995), Mr. Upshur believes he was entitled under the Sixth Amendment to a jury trial because, despite the reduction in the maximum sentence effected by D.C. Act 10-238, 41 D.C. Reg. 2608, possession of cocaine in violation of D.C. Code § 33-541(c) is not a petty offense. This case raises a very important related issue, in that Mr. Upshur was denied a fair trial by an impartial adjudicator guaranteed by the Sixth Amendment and the Due Process clause of the Fifth Amendment, regardless of whether possession of cocaine is denominated a petty or serious offense.

### *STANDARD OF REVIEW*

The right to a jury trial in a criminal case in which the offense charged is not a petty offense, and the right to an impartial adjudicator regardless of whether the offense is serious or petty are among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California,* 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "[T]he impartiality of the adjudicator goes to the very integrity of the legal

system. . . . The right to an impartial adjudicator, be it judge or jury, is such a right." *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). *See, also, Gomez v. United States*, 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989); *Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Therefore, if this Court determines that possession of crack cocaine in violation of D.C. Code § 33-541(d) is not a petty offense, it must order a new trial. Similarly, if, based on an independent review of the entire record of this case, the Court concludes that the Trial Judge was not the impartial adjudicator guaranteed to Mr. Upshur by the Fifth and Sixth Amendments it must reverse his conviction. The right to trial by jury for all but petty offenses and the right to an impartial adjudicator are "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from [their] denial." *Chapman, supra*, at 43 (Stewart, J., concurring).

### *THE CITY COUNCIL CONSIDERS POSSESSION OF COCAINE TO BE A SERIOUS OFFENSE*

Because the Court's ruling in *Burgess, supra*, is likely to be applicable in this case, Mr. Upshur only summarizes the arguments advanced in that case, and wishes to preserve his right to seek further appellate review should the Court conclude that the Misdemeanor Streamlining Act is constitutional.

The Supreme Court's decision in *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989) establishes the framework for analyzing whether the District of Columbia can eliminate the right to trial by jury in most misdemeanors merely by reducing the maximum penalties for them to 180 days in jail.

> It has long been settled that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision. . . . (citations omitted)" In determining whether a particular offense should be categorized as "petty" our earlier decisions focused on the nature of the offense and on whether it was triable by jury at common law. . . . (citations omitted) In recent years we have sought more "objective indications of the seriousness with which society regards the offense." (citations omitted) "We have found the most relevant such criteria is the severity of the maximum authorized penalty."

*Id*., at 538. Thus, the primary question is whether an offense is "petty," and, therefore, non-jury demandable; or "serious," and, therefore, to be tried by jury. In *Blanton,* the High Court established a rebuttable presumption that if the legislature sets the maximum penalty at six months or less a court may rationally infer that the legislature believes the offense to be a "petty" offense. This tactic was necessary because the decision in *Blanton* represented a departure from previous modes of analysis, and legislatures had never before been called upon to state whether they considered specific offenses to be "serious" or "petty." Lacking an explicit statement of the legislature's determination of the seriousness of an offense, the Court had to rely on indirect "reflections" and "indications" of the legislature's and society's view of seriousness, such as the length of the maximum penalty.

**The Legislative History of the OCJRAA Demonstrates the Council's Intent**

There is no statement from the City Council in the text of D.C. Act 10-238 or in its legislative history indicating that it considers the affected offenses to be petty. The Report of the Judiciary Committees states,

> Title I reduces the length of sentences for various crimes to make them non-jury demandable. Under *Blanton v. City of Las Vegas,* the *Supreme Court* indicated that *it* would presume that offenses punishable by less than 6 months are "petty offenses" and not subject to 6th Amendment guarantees of trial by jury. Title [I] reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable.

Report of the Committee on the Judiciary, January 29, 1994, pp. 3-4 (emphasis added). This statement indicates that the Council was attempting to conform to a formula for elimination of the right to jury trial, not that it had re-evaluated these offenses and determined they no longer were to be considered serious.

In fact, the City Council acted in the belief that D.C. Act 10-238 would effectively *increase* the penalty for the affected misdemeanors because convicted individuals sentenced to the maximum 180 days would not be eligible for parole. This notion was fostered by the testimony of Acting U.S. Attorney J. Ramsay Johnson, who told the Council's Judiciary Committee

> *Everybody is always paroled* at that date [after three months of incarceration] if they get time. . . . So the fact is that if the Judge attempts the maximum penalty of one year the reality is that the actual time served will be about ninety days. . . . So under the legislation that's been proposed, there is *no*, in fact, *reduction of the penalty*.

Transcript, Judiciary Committee, September 30, 1993, Testimony of J. Ramsay Johnson. (emphasis added). In a letter dated September 20, 1993, Chief Judge Ugast said

> Enactment of the revised penalty structure would have *little or no effect on sentences actually imposed on misdemeanants*. Notwithstanding one year maximums now applicable to most misdemeanor offenses, first, even second and, sometimes third time offenders are generally sentenced to probation or incarceration under 180 days. *Thus, the reduction in sentence maximums is little more than a reflection of current realities.*

Report of the Judiciary Committee, *supra*, Chief Judge Ugast Letter of September 20, 1993, p. 2 (emphasis added).

**The Council Did Not Change Its Views on the Seriousness of These Offenses**

In *Blanton*, the Supreme Court indicated that courts should look closely at the legislature's views on imprisonment "because incarceration is an intrinsically different form of punishment [citation omitted] it is the most powerful indication of whether an offense is serious." *Blanton*, *supra*, at 537. In the debate over the OCJRAA, Councilman Harold Brazil, the bill's co-sponsor, explained,

> I don't think that it's comprehensive misdemeanor reform so much as it is streamlining the misdemeanor system. Streamlining, which as you know — somewhat narrow in its scope. . . . [W]e wrestled so much with this issue in the first place that there was a *reluctance of Members to do something that essentially was, or seemed to be, a lessening of society's response to a criminal offense*. . . . I think we want to be strict. We want an efficient system of being strict.

Council of District of Columbia, Council Period X, 28th Legislative Meeting, Tuesday April 12, 1994, pp. 130-1 (emphasis added). Similarly, Councilman Ray stated,

> And Mr. Brazil, *I want to agree with you*. I think that one of the major problems in terms of crime is that we allow so many individuals to start off committing little crime, little crime, little crimes and we don't do anything about it, and finally they're killing someone and you know, and while we're talking about three strikes you're out, which I support for certain crimes, *we could solve a lot of that if we were tougher at the lower end*. So I agree with that.

*Id.*, at 143 (emphasis added).

The legislative history shows that the City Council was attempting to use what it believed to be an irrebuttable presumption established in *Blanton* to deny trial by jury. Report of the Committee on the Judiciary, January 26, 1994, pp. 3-4. Not a single person who testified before the Committee on this Act stated that he or she felt these crimes were not serious, and all of the supporters cited efficiency as the sole reason for supporting the Act. *Id.*, at pp. 12-14.

Judiciary Committee Chairman Nathanson warned his colleagues that

> the *Blanton* case says in effect that the record we are creating here *makes doing this unconstitutional* because what you have not discussed is the fact that the *Blanton* case says in effect that the presumption of pettiness is based on society's judgment that an offense is not serious. And we are not going through this list of fifty odd crimes to discuss whether each one is serious enough to be jury tried. As a matter of fact, we're establishing a record which says if you do it this way they are going to spend more time in jail so we consider them serious, as serious as they currently are, and maybe more serious, and this is the way to guarantee that they spend more time in jail quicker. . . . [N]o the whole purpose of the exercise is to make the court more efficient in dealing with misdemeanors and I read the *Blanton* case as saying *that's not a justifiable basis for changing the jury trial rule*.

Transcript, Judiciary Committee, September 30, 1993, Statement of Chairman Nathanson (emphasis added).

***AFTER HEARING THE SUPPRESSION MOTION THE TRIAL COURT WAS NOT THE IMPARTIAL ADJUDICATOR REQUIRED BY THE CONSTITUTION***

The U.S. Supreme Court stated that "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Ordinarily it is assumed that judges are capable of compartmentalizing events and the Constitution does not require a *per se* rule that a judge who presides over pretrial motions cannot render an impartial verdict in a bench trial. *Withrow v. Larkin*, 421 U.S. 35, 56, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712 (1975).

What the Court said about juries in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), is equally applicable to judges presiding over bench trials.

> In essence, the right to . . . trial guarantees to the criminal accused a fair trial by a[n] . . . impartial, "indifferent" [adjudicator]. The failure to accord an accused a fair hearing violates even minimal standards of due process. . . . In the language of Lord Coke, a[n]

> [adjudicator] must be as "indifferent as he stands unsworne." . . . His verdict must be based upon the evidence developed at the trial. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies . . . . "The theory of the law is that a[n adjudicator] who has formed an opinion cannot be impartial."

366 U.S. at 722.

In the case at bar, the transcript of the suppression hearing and trial clearly show that the Trial Judge exhibited favoritism to the Government from the outset, assumed facts not in evidence, and had a firmly held opinion about Mr. Upshur's guilt before the abbreviated trial began. There was little or nothing Trial Counsel could have done under the circumstances to disabuse him of that opinion.

**The Trial Court's Refusal To Deem the Suppression Motion Conceded or To Order a Response**

Because the initial charge of possession with intent to distribute crack cocaine had been reduced to simple possession, the Government's failure to respond in writing to the suppression motion was of considerable concern to Trial Counsel. The PD 163 described Mr. Upshur not as a purchaser, the crime for which he was tried and convicted, but as a dealer who had in his possession several ziplocks of crack and was seen walking away from a car with money in his hand. Therefore, it was apparent that the evidence supporting the immediate seizure of Mr. Upshur would differ from the recitation in the PD 163, and this conflict raised serious questions about the basis for the seizure.

Counsel argued that the Trial Court should treat the motion as conceded or, alternatively, that it should order a written opposition. "We would ask the Court, if the Court does not treat the motion as conceded, to give the defense enough time to look at the response, to read the response, read the case law, and see if there are any facts in there that require additional investigation in this case." Tr. 6.

The Government's only explanation for failure to respond in writing was that it did not have a copy of the motion in its file, not that Counsel had failed to serve it or that there was some

justification for its failure to comply with D.C. Crim. R. 47-I(c).[5] Although the only apparent explanation for the lapse was inefficiency in the U.S. Attorney's office, the Judge found "extenuating circumstances" and proceeded with the hearing and trial after the Prosecutor gave assurance that the testimony it would offer in support of the seizure would be consistent with the statement on the PD 163.

Rule 47-I(c) gives trial judges discretion to decide not to treat the suppression motion as conceded, but it does not give them discretion *sua sponte* on the day of trial to waive the requirement of a written response, particularly when the Government offered no good cause for its failure to comply with the rule. The rule requires the defense to raise suppression issues in writing in advance of trial or, under R. 12(d), they shall be considered waived unless the judge, for good cause, permits counsel to raise them. Fundamental fairness requires that the Government response be in writing as well, so the defense can fully prepare for the suppression hearing, which often is dispositive in cases like Mr. Upshur's, and waiver of that requirement should be granted only for good cause. Interpreting the mere failure of the U.S. Attorney's office to properly handle a motion that has been served as "good cause" would render meaningless the rule's requirement that a written response be filed.

**In the Suppression Hearing the Trial Court Found Facts Not in Evidence Favoring the Government and Refused To Consider Evidence Negating the Existence of Reasonable Cause for the Seizure**

There was no testimony in the suppression hearing or the trial concerning two facts the Trial Court found significant in ruling that police had reasonable, articulable suspicion to stop Mr. Upshur. The Court found that the officers had seen a two-way exchange, despite Ofc. Worrell's repeated testimony that he had seen money and nothing else change hands. *See 16 above.* In addition, it found that Mr. Upshur attempted to evade police by walking away "briskly"

[5] D.C. Crim. R. 12(b)(3) requires that motions to suppress evidence must be made prior to trial and the Comment explaining the rule states that paragraph (b) "omits language in the Federal Rule that leaves to the judge's discretion whether a motion shall be written or oral. In contrast to Federal Rule of Criminal Procedure 12, Rule 47 of this Court requires pretrial motions to be in writing unless the Court permits the motion to be made orally."

D.C. Crim. R. 47-I(c) states that "A written statement of opposing points and authorities shall be filed within 10 days thereafter and shall be served upon all parties unless otherwise provided by the Court. If the opposition is not filed within the prescribed time, the court may treat the motion as conceded."

when he saw the cruiser, although the only person to have stated this is the Prosecutor prior to the suppression hearing. *See 19 above.*

Even more egregious was the Trial Court's adamant refusal to consider conflicts between Ofc. Worrell's testimony and the fact statement in the PD 163. The Government placed Ofc. Weston's contemporaneous description of events in issue when it argued that the Court should proceed with the suppression hearing, stating that Ofc. Worrell's "would testify exactly as was stated here." Tr. 6. But Ofc. Worrell's testimony differed significantly from the police report. He stated that he saw money change hands between Mr. Upshur and the driver of the car, and that it appeared that the driver kept the money. As Mr. Upshur walked away there was no money visible in his hand, the officer said. This testimony tended to support the prosecution theory at trial, that Mr. Upshur was the buyer, but it conflicted with Ofc. Weston's scenario in the PD 163, which depicted Mr. Upshur as the seller, who walked away from a just-completed transaction with money and additional packets of crack.

But when Trial Counsel attempted to demonstrate this, initially by using the PD 163 to refresh Ofc. Worrell's memory, but really in an attempt to impeach him, the Government objected that "it's not this Officer's document." Tr. 25. Trial Counsel established that, although Ofc. Worrell did not write the statement, he was familiar with its contents and that it conflicted with his testimony. *Id.*, at 26-27.

The Government put the contents of the PD 163 in issue. Despite its recitation of the statement in the police report prior to the hearing, and its assertion that the testimony would match that statement, and despite Ofc. Worrell's acknowledgment that his testimony conflicted with the statement, when Trial Counsel raised the discrepancy in support of the motion the Judge stated:

> I won't hear from you about what Weston has in his report. I don't accept that as evidence for purposes of this hearing. . . . I don't know what is in the 163 except I have heard from the officer a reference to it and your one sentence or so reference to it. It does not hold much probative power value for me.

Tr. 36. When Counsel pressed the point later in his argument, the Judge said:

> I accept what this officer says for purposes of this motion. I believe the occurrence took place as to the only witness testifying today said it took place. . . . That hearsay statement is of little significance to me. It wasn't used to impeach him or to refresh his recollection, you just had him refer to it, he said, yes, there's a 163 and the officer wrote something else in there. So it's a very minimal — I mean, to me it's remote to this proceeding. I must tell you again, I place no confidence and repose no believe (sic) particularly in what the 163 has to say for purposes of deciding this motion.

Tr. 41.

Yet this Court recently noted, in ruling on whether police had articulable suspicion for a stop, that "these inconsistencies . . . were matters of *important* detail whose accuracy was better judged as having been recorded shortly after the encounter occurred as opposed to subsequent recitations in the trial court setting." *Hawkins, supra*, 663 A. 2d at 1228 (emphasis in original).

***THE TRIAL COURT COULD NOT SET ASIDE INFORMATION LEARNED IN THE SUPPRESSION HEARING AND MAKE A DETERMINATION OF GUILT BASED SOLELY ON TRIAL TESTIMONY***

The Judge's statement about Ofc. Worrell's credibility, coupled with his inquiry at the beginning of the trial as to whether the Government intended to recall its witness, Tr. 50-51, sent a clear message. The Court added that "my thought would be that if you were satisfied that you had opportunity to examine him about what he's testified about already sufficiently that the Government not restate — you know, reexamine on all those issues." *Id.*, at 51. The Prosecutor could not help but understand that there was really no need to put on any evidence relevant to guilt other than to place the ziplock bags of crack in evidence. It would have been foolhardy to call Ofc. Weston, its second witness,[6] given that the Trial Court had already expressed unwavering confidence in the version of events provided by Ofc. Worrell.

Mr. Upshur's trial testimony conflicted in nearly all respects with that of Ofc. Worrell. The only points on which they agreed were that Mr. Upshur was standing beside the car talking to the driver when the cruiser arrived on the scene and that the car nearly struck him and Ofc. Weston as it sped away. Based on the chain of events before he testified, the trial can be viewed as no more than a formality. It is hardly surprising that the Trial Court, taking into account

[6] The Government had indicated at the calendar call that it would call two witnesses. Tr. 3.

testimony at the suppression hearing, found the "the Government's testimony is credible, I credit it, and because I do, I conclude that it has established both the defendant's identity as well as the elements of this offense." Tr. 71.

## CONCLUSION

For the reasons stated above and any others that may appear to the Court, Mr. Upshur respectfully requests that his conviction be vacated and that the evidence against him be suppressed as having been obtained in violation of his Fourth Amendment Protection against unreasonable searches and seizures.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Reginald V. Upshur, certify that on January 16, 1996 I served a true copy of the attached Brief of Appellant by first-class mail on John R. Fisher, Assistant U.S. Attorney, 555 Fourth Street, N.W., Washington, D.C. 20001.

Robert S. Becker