

09-0294-cr

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-0294-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD RIVERA,
Defendant-Appellant,

JAMES SCOTT
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	vii
Statement of Issues Presented for Review.....	viii
Preliminary Statement.....	1
Statement of the Case.....	3
Statement of Facts and Proceedings	
Relevant to this Appeal.....	4
A. Relevant facts.....	4
B. The district court's ruling.....	7
Summary of Argument.....	12
Argument.....	14
I. The district court did not err in determining that the police had reasonable suspicion for an investigatory stop of the defendant and his vehicle.....	14
A. Relevant facts.....	14
B. Governing law and standard of review.....	14
1. Law relating to investigatory stops.....	14

2. The standard of review.....	18
C. Discussion.....	18
II. The district court did not abuse its abuse its discretion in denying the motion to suppress without an evidentiary hearing because the facts were not in dispute	28
A. Relevant facts.....	28
B. Governing law and standard of review.....	28
1. Law relating to the need for a hearing. ...	28
2. The standard of review.....	29
C. Discussion.....	29
Conclusion.....	33
Certification per Fed. R. App. P. 32(a)(7)(C)	
Addendum	

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Adams v. Williams</i> , 407 U.S. 143 (1972).....	14
<i>Alabama v. White</i> , 496 U.S. 325 (1990).....	18, 21
<i>Grant v. United States</i> , 282 F.2d 165 (2d Cir. 1960).....	29, 30
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	16, 21
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	15, 16
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	14, 15, 16, 21, 28
<i>United States v. Arboleda</i> , 633 F.2d 985 (2d Cir. 1980).....	30
<i>United States v. Arvizu</i> , 534 U.S. 266 (2002).....	15

<i>United States v. Bayless</i> , 201 F.3d 116 (2d Cir. 2000).....	16
<i>United States v. Canfield</i> , 212 F.3d 713 (2d Cir. 2000).....	17, 20
<i>United States v. Colon</i> , 250 F.3d 130 (2d Cir. 2001).....	16
<i>United States v. Cruz</i> , 834 F.2d 47 (2d Cir. 1987).....	16
<i>United States v. Culotta</i> , 413 F.2d 1343 (2d Cir. 1969).....	29, 30, 32
<i>United States v. Delossantos</i> , 536 F.3d 155 (2d Cir. 2008), <i>cert. denied</i> , 129 S.Ct. 649 (2008).....	25
<i>United States v. Elmore</i> , 482 F.3d 172 (2d Cir. 2007).	16, 17, 20, 26
<i>United States v. Gillette</i> , 383 F.2d 843 (2d Cir. 1967).	30
<i>United States v. Lawes</i> , 292 F.3d 123 (2d Cir. 2002).....	15
<i>United States v. Lewis</i> , 40 F.3d 1325 (1st Cir. 1994).	31

<i>United States v. Lucky</i> , 569 F.3d 101 (2d Cir. 2009).	18
<i>United States v. Mapp</i> , 476 F.2d 67 (2d Cir. 1973).	30
<i>United States v. Martinez-Molina</i> , 64 F.3d 719 (1st Cir. 1995)	9, 25
<i>United States v. Mejia</i> , 953 F.2d 461 (9th Cir. 1992).	31
<i>United States v. Moreno</i> , 897 F.2d 26 (2d Cir. 1990).	27
<i>United States v. Oates</i> , 560 F.2d 45 (2d Cir.1977).	16
<i>United States v. Patrick</i> , 899 F.2d 169 (2d Cir. 1990).	27
<i>United States v. Pena</i> , 961 F.2d 333 (2d Cir. 1992)..	28, 29
<i>United States v. Richardson</i> , 764 F.2d 1514 (11th Cir. 1985).	32
<i>United States v. Rodriguez</i> , 69 F.3d 136 (7th Cir. 1995).	31
<i>United States v. Salazar</i> , 945 F.2d 47 (2d Cir. 1991).	17

<i>United States v. Sokolow</i> , 490 U.S. 1 (1989).....	15
<i>United States v. Wagner</i> , 989 F.2d 69 (2d Cir. 1993).....	17, 20
<i>United States v. Warren</i> , 453 F.2d 738 (2d Cir. 1972).....	28, 30, 31
<i>United States v. Watson</i> , 404 F.3d 163 (2d Cir. 2005).....	18, 28, 30, 32
<i>Wardlow v. Illinois</i> , 528 U.S. 119 (2000).....	15
<i>White v. State</i> , 550 So.2d 1074 (Ala. Crim. App. 1989).....	22, 26

STATUTES

18 U.S.C. § 3231.....	vii
21 U.S.C. § 841.....	3, 4
21 U.S.C. § 846.....	3, 4
28 U.S.C. § 1291.....	vii

RULES

Fed. R. Crim. P. 11.....	vii
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Statement of Jurisdiction

This criminal appeal results from the conviction after guilty plea of the defendant-appellant Richard Rivera. The defendant entered a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2), reserving his right to appeal the district court's ruling of May 28, 2008, denying his motion to suppress evidence.

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered its judgment on January 20, 2009. The defendant filed a timely notice of appeal on January 20, 2009, and this Court has jurisdiction to consider this appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291.

**Statement of Issues
Presented for Review**

- I. Whether the district court erred in determining that the police had reasonable suspicion to conduct an investigatory stop of the defendant and his vehicle where the police had corroborated substantial information from a confidential source that lead them to reasonably suspect that there was a large quantity of crack cocaine inside the defendant's vehicle.

- II. Whether the district court abused its discretion in denying the defendant's request for an evidentiary hearing on his motion to suppress evidence when there were no material facts in dispute.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal concerns the Fourth Amendment's requirement of *reasonable suspicion* to support an investigatory stop of an individual and his vehicle. A confidential source (the "CS") advised police officers that, *inter alia*: an individual named James Scott was a state fugitive; Scott had a large quantity of crack cocaine that he

wanted to sell; Scott had arranged to conduct the drug transaction with the CS at the Olive Garden restaurant parking lot at 10:00 a.m. on October 18, 2007; and Scott would be a “passenger” in a “wagon.” Officers confirmed that Scott was in fact a state fugitive. When officers arrived at the Olive Garden parking lot at 9:50 a.m. on October 18, 2007, the officers observed Scott standing next to and speaking to the driver of a blue wagon in the relatively empty parking lot of the Olive Garden restaurant, which was closed at that time. At approximately the agreed-to time for the drug transaction, the CS called Scott and the officers observed Scott answer the phone in the presence of the driver of the wagon. The officers proceeded to arrest Scott on a state arrest warrant and conducted an investigatory stop of the driver of the wagon and his vehicle, so that a drug-sniffing canine could examine the exterior of the wagon.

In this appeal, the defendant contends that the police did not have reasonable suspicion to conduct an investigatory stop of the defendant and his vehicle. This Court should reject this claim as did the district court. The officers had reasonable suspicion on the basis of the information furnished by the CS, the substantial corroboration of this information and their observations during the morning of October 18, 2007.

The defendant also contends that the district court abused its discretion in denying the motion to suppress without holding an evidentiary hearing. The defendant, however, has never identified a single contested issue of fact relating to the investigatory stop of the defendant and

his vehicle. Accordingly, the Court should affirm the judgment and conviction of the district court.

Statement of the Case

On November 27, 2007, a federal grand jury in Connecticut returned an indictment charging the defendant and his co-conspirator, James Scott, with two counts. *See* Government's Appendix ("GA") at 2 (docket entry). In count one of the indictment, the defendant and James Scott were charged with conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). GA at 9-10. In count two of the indictment, the defendant and James Scott were charged with possession with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). GA at 10.

On February 27, 2008, the defendant filed a motion to suppress evidence and a supporting memorandum of law. *See* Joint Appendix ("JA") submitted by Defendant-Appellant Richard Rivera at 1 and 3. On April 4, 2008, the government filed a memorandum of law in opposition to the defendant's motion to suppress. JA at 47. On May 2, 2008, the defendant filed a reply to the government's memorandum of law. JA at 66.

On May 28, 2008, the district court (Ellen Bree Burns, J.) issued an unpublished, written ruling denying the defendant's motion to suppress. JA at 80.

On July 8, 2008, the defendant entered a conditional plea of guilty to count one of the indictment charging him with conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). GA at 6 (docket entry) and 12-22.

On January 8, 2009, the district court sentenced the defendant principally to a term of 121 months imprisonment, to be followed by a five-year term of supervised release. GA at 8 (docket entry). On the same day, the court granted the government's motion to dismiss count two of the indictment, in light of the imposition of sentence on the basis of the defendant's guilty plea to count one of the indictment. GA at 8 (docket entry). The district court entered judgment on January 20, 2009. GA at 8 (docket entry).

On January 20, 2009, the defendant filed a timely notice of appeal. GA at 8 (docket entry). The defendant is serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Relevant facts

The district court found that “[t]here is no dispute about the facts relevant to [the district court’s] ruling.” JA at 80. In addition, the district court found that “both parties assume[d] the truth of the facts set forth in reports produced by law enforcement officers in connection with

this case.” JA at 80. Accordingly, the relevant facts, as found by the district court, are as follows:

On October 17, 2007, a “confidential source” (“CS”) informed [DEA Task Force Agent John Rosetti] that one James Scott was preparing to conduct a transaction involving a large quantity of crack cocaine in Manchester, Connecticut. The CS described Scott as a “clean cut” white male and told Rosetti that Scott was a fugitive. According to the CS, Scott was in possession of approximately nine ounces of crack cocaine. Agent Rosetti was able to confirm that a convicted felon named James Scott was at that time wanted after escaping from a halfway house.

The CS told Rosetti that Scott would be in the parking lot of a particular Olive Garden restaurant in Manchester. The CS first said that the “deal should go promptly” at 10:00 a.m. on October 17, 2007, but later the CS told Rosetti that the transaction had been postponed until 10:00 a.m. the following day due to the distance that Scott would need to drive from his current location. According to Rosetti’s report, the CS told Rosetti that Scott would be the “passenger inside of a wagon” but was not able to describe the vehicle in any greater detail.

On October 18, DEA agents, together with officers from the Manchester Police Department, set off for the Olive Garden to await Scott’s

arrival. When the surveillance units arrived at the Olive Garden, they observed a man matching Scott's description standing beside a blue station wagon and talking to an individual seated in the driver's seat of the vehicle. Rossetti determined, based on a comparison with a photograph he had located, that the man was indeed the fugitive Scott. This identification was further confirmed when, at a prearranged time, the CS telephoned Scott and the officers observed that Scott appeared to be speaking on a cell phone. At the time, the Olive Garden restaurant was closed and, as a result, there were "only a few" other cars in the parking lot.

At this point, the officers had no information about the driver of the wagon who later turned out to be defendant Rivera. The officers approached the blue station wagon, ordered Scott and Rivera to the ground, and handcuffed both men. Scott identified himself and was told that he was being arrested on a warrant. Scott was then placed in a marked police car.

A drug-sniffing dog was brought to the wagon and it conducted an examination of the exterior of the vehicle. The dog alerted officers to the presence of narcotics by scratching at the area around the driver's side door handle. The officers then directed the dog to examine the inside of the vehicle. The dog alerted officers to the glove box, where a bag of marijuana was discovered, and to

the area under a speaker box in the rear of the vehicle, where a quantity of crack cocaine was discovered. Officers also discovered a quantity of U.S. currency in the car. . . .

Rivera was taken to the police station, where he was informed of his *Miranda* rights. Rivera waived his rights Rivera told the officers, among other things, that there was additional cocaine in the hotel room that he had been sharing with Scott in Maine. Rivera provided written consent for the officers to search this hotel room. A subsequent search of the hotel room uncovered additional physical evidence

JA at 81-83.

B. The district court's ruling

The defendant filed a motion to suppress, that as relevant here, argued that the police violated the Fourth Amendment when they detained him and his vehicle. On May 28, 2008, the district court issued a written ruling denying the motion to suppress. The court concluded, in pertinent part, that the police had reasonable suspicion to detain the defendant and his vehicle to allow a drug-sniffing dog to examine the exterior of the defendant's vehicle. JA at 83-89.

The district court rejected the defendant's argument that the search of the defendant's vehicle violated the Fourth Amendment because, according to the defendant,

the police did not have probable cause to believe that the defendant was involved in criminal activity. JA at 83-86. The district court explained, in part, that “the police are permitted, based on reasonable suspicion to believe that criminal activity may be afoot, to detain a vehicle and its occupants for the purpose of conducting a brief investigatory stop[.]” JA at 84 (internal citations and quotations omitted). The district court further noted that “[c]ourts have routinely held that ‘[o]fficers with reasonable suspicion to believe that the occupants of a vehicle are engaged in the unlawful transportation of contraband may detain the vehicle for a reasonable time to obtain a properly trained dog to sniff for contraband.’” JA at 85 (citations omitted).

The district court reviewed relevant case law discussing investigatory stops of vehicles and people, and then made the following findings:

The officers in this case had information that Scott was in possession of a large quantity of crack cocaine and that he planned to be in the Olive Garden parking lot ready to participate in a transaction involving the drugs. According to Rossetti’s report, the CS’s relatively detailed information included the fact that Scott would be the “passenger” in a “wagon.” When the officers observed Scott standing next to Rivera’s blue wagon and talking to the driver, it was reasonable for them to have suspected that the blue wagon was the vehicle in which Scott had arrived and that the vehicle contained the contraband that

Scott was reported to have brought to the location. It was also reasonable to suspect that the driver of the car was involved in the criminal activity.

JA at 87.

In addressing the argument that the defendant's "mere propinquity" to James Scott does not, without more, give rise to reasonable suspicion that the defendant was involved in criminal activity, the district court found the following:

[T]he officers' suspicions about Rivera and his vehicle were based on much more than his mere propinquity to Scott since, as discussed above, the officers had information about the kind of vehicle in which Scott was to arrive as a passenger. Rivera's argument that the officers had no information connecting him to the suspected drug activity is undermined by other key facts as well. At the time in question, the Olive Garden parking lot was relatively empty because the restaurant was closed, thus making it somewhat less likely that members of the public who were not involved in the transaction would be present. Also, the CS reported that the transaction was to occur at a very specific time and arranged to call Scott on his cell phone around that time. The fact that Scott answered this call in the presence of Rivera supports the inference that Rivera was involved. *See United States v. Martinez-Molina*, 64 F.3d 719, 729 (1st Cir. 1995) (dismissing the notion

that “officers in the field are required to divorce themselves from reality or to ignore the fact that ‘criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger-than-necessary audiences’”) (quoting *United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir. 1992)).

JA at 87-88.

The district court concluded that “[i]t is clear that the officers possessed ‘specific articulable facts’ that, together with rational inferences from these facts, gave rise to reasonable suspicion that Rivera and his vehicle were involved in criminal activity. The officers were therefore justified in detaining the vehicle and its occupant for the purpose of determining whether their suspicions were accurate.” JA at 88 (citations omitted). The district court further stated, “[i]ndeed, some courts have found probable cause to be present in circumstances that are difficult to distinguish from the facts of this case.” JA at 89 (citations omitted).

The district court further explained that “[a]fter examining the exterior of the vehicle, the drug-sniffing dog alerted officers to the presence of narcotics.” JA at 89. The district court ruled that “[a]t this point, the officers had probable cause to conduct a full search of the vehicle

and to continue to detain its occupant.” JA at 89-90 (citations omitted).¹

Turning to whether the court needed to hold an evidentiary hearing on the defendant’s motion to suppress, the district court stated it “sees no need to conduct a hearing as the parties have not drawn the Court’s attention to any factual dispute.” JA at 98 (citations omitted). The district court found that “[t]he defendant, like the government, relies entirely on the version of events supplied by Agent Rossetti’s reports.” JA at 98. The district court further stated, “[t]he defendant’s sole argument for suppression is that ‘even under the agents’

¹ The district court also addressed other suppression arguments raised by the defendant that are outside the scope of this appeal. Specifically, the district court ruled that the officers’ use of handcuffs to restrain the defendant after he was ordered out of the vehicle was reasonable under the circumstances and did not amount to a formal arrest and, in any event, the evidence seized from his vehicle was not the fruit of his allegedly unlawful detention. JA at 91-97. In addition, the district court rejected the defendant’s arguments that the defendant’s statements at the police station should be suppressed as fruits of his allegedly unlawful seizure in the Olive Garden parking lot and the evidence seized from his Maine hotel room should be suppressed as fruits of his statements at the police station. JA at 97-98. Because these issues are not raised by the defendant in this appeal, however, they are waived and not addressed in this brief.

version of events, Mr. Rivera was stopped and his vehicle was searched illegally.” JA at 98 (citations omitted).

The district court noted that in the defendant’s reply to the government’s memorandum, the defendant “attempt[ed] to create a number of factual disputes” by disputing “certain conclusory statements made by the government in its Memorandum.” JA at 99. The district court made clear that it only relied on facts drawn from the law enforcement reports attached to the defendant’s memorandum and, therefore, concluded that the defendant’s “belatedly manufactured factual disputes are immaterial.” JA at 99.

The district court also addressed the defendant’s argument that he “is entitled to a hearing at which he could learn about the agents’ investigation, ‘probe the reliability of the [CS],’ and ‘present evidence of his own.’” JA at 99. The district court stated that it “is not required to grant Rivera an evidentiary hearing absent a showing by him that there are factual disputes related to these issues.” JA at 99-100 (citations omitted). The district court ruled that the defendant “has failed to make such a showing with any level of specificity” and, “[t]herefore, a hearing is not required.” JA at 100.

Summary of Argument

I. The district court properly found that the police had reasonable suspicion to conduct an investigatory stop of the defendant and his vehicle in the relatively empty parking lot of the Olive Garden restaurant. A confidential

source advised police that James Scott, a state fugitive, had a large quantity of crack cocaine that he wanted to sell, that Scott had arranged to conduct the drug transaction with the CS at the Olive Garden restaurant parking lot at 10:00 a.m. on October 18, 2007 and that Scott would be a “passenger” in a “wagon.” At the time and location agreed-to for the drug transaction, police observed Scott standing next to and speaking to the driver of a blue wagon in the relatively empty parking lot of the Olive Garden restaurant, which was closed at that time. After positively identifying Scott, the CS called Scott and the officers observed Scott answer the phone in the presence of the driver of the wagon. The officers proceeded to arrest Scott on a state arrest warrant and conducted an investigatory stop of the driver of the wagon and his vehicle, so that a drug-sniffing canine could examine the exterior of the wagon. Based on the information provided by the CS and the observations by the police, ample reasonable suspicion existed to warrant an investigatory stop of the defendant and his vehicle. Indeed, as the district court stated, “some courts have found probable cause to be present in circumstances that are difficult to distinguish from the facts of this case.”

II. The district court did not abuse its discretion in determining that an evidentiary hearing on the defendant’s motion to suppress was not warranted. As the district court correctly found, the defendant failed to show that there were any contested issues of fact relating to the motion to suppress. Accordingly, the Court should affirm the judgment and conviction of the district court.

ARGUMENT

I. The district court did not err in determining that the police had reasonable suspicion for an investigatory stop of the defendant and his vehicle.

A. Relevant facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing law and standard of review

1. Law relating to investigatory stops

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court construed the Fourth Amendment's prohibition against unreasonable searches and seizures to permit a law enforcement officer to briefly detain an individual for questioning if the officer has a reasonable, articulable suspicion that the individual is involved in criminal activity. The "*Terry* stop" rule recognizes that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 144 (1972).

Accordingly, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion

that criminal activity is afoot.” *Wardlow v. Illinois*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30); see generally *United States v. Arvizu*, 534 U.S. 266 (2002) (discussing *Terry*).

“Reasonable suspicion is not a high threshold.” *United States v. Lawes*, 292 F.3d 123, 127 (2d Cir. 2002). Although the concept of “reasonable suspicion” is not precisely articulable, see *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), it requires “some minimal level of objective justification” for making a stop, but “considerably less than proof of wrongdoing by a preponderance of the evidence,” and the standard is “obviously less demanding” than probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (internal citation omitted); see also *Arvizu*, 534 U.S. at 274 (same).

In evaluating the lawfulness of a *Terry* stop, a reviewing court “must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.” *Arvizu*, 534 U.S. at 273 (internal quotations omitted). The validity of a brief investigatory stop is to be “judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?” *Terry*, 392 U.S. at 21-22 (internal quotations omitted).

“The principal components of a determination of reasonable suspicion or probable cause will be the events

which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.” *Ornelas*, 517 U.S. at 696. As this Court has emphasized, “the court must evaluate those circumstances ‘through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.’” *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000) (quoting *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977)).

The collective knowledge of several law enforcement officers jointly involved in an investigation may be considered in determining the existence of reasonable suspicion to support a *Terry* stop. See *United States v. Colon*, 250 F.3d 130, 135 (2d Cir. 2001); cf. *United States v. Cruz*, 834 F.2d 47, 51 (2d Cir. 1987) (probable cause to arrest can be based on the collective knowledge of all officers involved in a surveillance where the various officers were in communication with each other).

“Reasonable suspicion may be based upon information from a confidential informant so long as the tip bears sufficient indicia of reliability.” *United States v. Elmore*, 482 F.3d 172, 179 (2d Cir. 2007) (internal quotation marks omitted). “Informants’ tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability,” and “[r]igid legal rules are ill-suited to an area of such diversity.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (internal citations and quotation marks omitted). “[E]ven if we entertain some

doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.” *Id.* at 234.

In addition, “it is improper to discount an informant’s information simply because he has no proven record of truthfulness or accuracy.” *United States v. Canfield*, 212 F.3d 713, 719 (2d Cir. 2000) (quoting *United States v. Wagner*, 989 F.2d 69, 73 (2d Cir. 1993)). An informant’s “veracity can be shown in other ways.” *Id.* For example, an informant’s veracity may be established if the informant’s information is provided face-to-face, rather than anonymously: “[A] face-to-face informant must, as a general matter, be thought more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false.” *Id.* (quoting *United States v. Salazar*, 945 F.2d 47, 50-51 (2d Cir. 1991)).

Moreover, whether the information is anonymous or face-to-face, “if an informant’s declaration is corroborated in material respects, the entire account may be credited, including parts without corroboration.” *Id.* at 719-20 (quoting *Wagner*, 989 F.2d at 73). “Even a tip from a completely anonymous informant – though it will seldom demonstrate basis of knowledge and the veracity of an anonymous informant is largely unknowable [] – can form the basis of reasonable suspicion or probable cause if it is sufficiently corroborated.” *Elmore*, 482 F.3d at 179 (citation omitted). “Under the totality of the circumstances

approach mandated by [the Supreme Court], even a completely anonymous tip could support a finding of probable cause with a sufficient degree of corroboration. The degree of corroboration required for a finding of reasonable suspicion is obviously less.” *Id.* at 180 (citing *Alabama v. White*, 496 U.S. 325, 330-31 (1990)).

In sum, as this Court has recognized, “informants do not fall into neat categories of *known* or *anonymous*” and accordingly “it is useful to think of known reliability and corroboration as a sliding scale.” *Id.* at 181. “[W]hen the informant is only partially known (i.e., her identity and reliability are not verified, but neither is she completely anonymous), a lesser degree of corroboration may be sufficient to establish reasonable suspicion” than the amount of corroboration required for a completely anonymous informant. *Id.*

2. The standard of review

In reviewing the denial of a suppression motion, the Court of Appeals reviews the district court’s conclusions of law *de novo*, and its findings of fact for clear error, taking those facts in the light most favorable to the government. *United States v. Lucky*, 569 F.3d 101, 105-106 (2d Cir. 2009); *United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005).

C. Discussion

The district court properly concluded that the officers’ investigatory stop of the defendant and his vehicle was supported by reasonable suspicion. The totality of the

circumstances amply supported the district court's conclusion. The police possessed, *inter alia*, the following information: that Scott would be in possession of a large quantity of crack cocaine; that he planned to be in the Olive Garden parking lot at 10:00 a.m. on October 18, 2007 to conduct a drug transaction; and that he would be the "passenger" in a "wagon." *See* JA at 81. As the district court found, when the officers saw Scott standing next to Rivera's blue wagon and talking to Rivera at the time and location that the drug deal was to occur, it was reasonable for the police to suspect that the blue wagon was the vehicle in which Scott had arrived, that the vehicle contained the crack cocaine that Scott was reported to have brought to the location, and that the driver of the car was involved in the criminal activity. *See* JA at 87. The court's determination is further supported by the fact that the Olive Garden parking lot was relatively empty because the restaurant was closed and the fact that Scott answered a phone call from the CS in the presence of Rivera at the time that Scott was to conduct the drug transaction with the CS. *See* JA at 87-88.

The defendant argues that the CS should be treated as an anonymous informant. Def. Br. at 6-7. The defendant further argues that the information from the CS and the corroboration by the police did not establish reasonable suspicion to justify the investigative stop. *See* Def. Br. at 7-11. The defendant's arguments are unavailing.

As an initial matter, this case does not involve an anonymous tipster. Rather, the information was provided by a confidential source (*see* JA at 25, 29 and 81) – that is,

someone “who may be held accountable if his allegations turn out to be fabricated.” *Elmore*, 482 F.3d at 180 (recognizing that information from a known informant requires a lesser degree of corroboration because the informant can be held accountable for false information); *see also Canfield*, 212 F.3d at 719 (“[A] face-to-face informant must, as a general matter, be thought more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false”) (internal quotations omitted). Accordingly, as this Court recognized in *Elmore*, “a lesser degree of corroboration may be sufficient to establish reasonable suspicion” than the amount of corroboration required had the CS been completely anonymous. 482 F.3d at 181.

Further, even assuming *arguendo* that the CS was a completely anonymous informant, there was more than ample corroboration of the CS’s information to support the district court’s reasonable suspicion determination. Whether the information is anonymous or face-to-face, “if an informant’s declaration is corroborated in material respects, the entire account may be credited, including parts without corroboration.” *Canfield*, 212 F.3d at 719-20 (quoting *Wagner*, 989 F.2d at 73). In the instant case, the information provided by the CS was corroborated in material respects. As an initial and important point, the officers corroborated that Scott was in fact a state fugitive, as claimed by the CS. *See* JA at 81-82. In addition, the CS provided “extremely detailed” information about Scott, including his name, his physical description, and information regarding Scott’s fugitive status. The CS

further provided information regarding the specific amount of crack cocaine that Scott had in his possession, the specific time and location that Scott wanted to conduct a drug transaction, the amount of time it would take Scott to travel to the particular location, and the type of vehicle that Scott would be in at the time of the drug transaction. *See* JA at 25, 29-30 and 81. *See also Gates*, 462 U.S. at 234 (recognizing that “explicit and detailed description of alleged wrongdoing” by informant entitles tip to greater weight than might otherwise be the case).

The Supreme Court has consistently recognized the importance of predictive information provided by informants. *See Alabama v. White*, 496 U.S. 325, 330-32 (1990); *Gates*, 462 U.S. at 243-45. Indeed, in his brief, the defendant discusses the Supreme Court’s decision in *White*, which upheld a *Terry* stop based on a completely anonymous tipster’s ability to predict a suspect’s future behavior. *See* 496 U.S. at 332. The *White* decision – along with other decisions by the Supreme Court involving predictive information provided by informants – strongly supports the district court’s ruling in this case.

In *White*, the police received an anonymous telephone tip that a woman named Vanessa White would be leaving a particular apartment at a particular time in a brown Plymouth station wagon with the right taillight broken, that she would go to Dobby’s Motel and that she would be in possession of about an ounce of cocaine inside a brown attache case. *See* 496 U.S. at 326-27. Police officers observed a brown Plymouth station wagon with a broken right taillight in the parking lot of the apartment building.

See id. at 327. The officers observed a woman (*i.e.*, the defendant) leave the building, carrying nothing in her hands, and enter the station wagon. *See id.* The officers followed the vehicle as it drove in the direction of Dobey's Motel. *See id.* When the vehicle reached the Mobile Highway, on which Dobey's Motel is located, the officers stopped the vehicle just short of the motel. *See id.* The officers removed the defendant from the vehicle and advised her that she had been stopped because she was suspected of carrying cocaine. *See id.* During a consent search of the vehicle, the officers found marijuana in an attache case in the car and, during processing at the police station, found three milligrams of cocaine in the defendant's purse. *See id.*

The Alabama Court of Criminal Appeals held that the officers did not have reasonable suspicion necessary to justify the investigative stop of the defendant's car. *See White v. State*, 550 So.2d 1074, 1078-80 (Ala. Crim. App. 1989). As an initial matter, the Alabama appellate court found that "[t]he police officers knew nothing about the informer." *Id.* at 1078. In addition, the Alabama court found that the "informer gave no physical description of the named person and, [the officer] testified, he did not know Vanessa White." *Id.* at 1079. The Alabama court found that "the officers did not even corroborate that it was Vanessa White who emerged from the [apartment building] and got into the described vehicle. The officers had no way of knowing if [the defendant] was the woman to whom the informer referred." *Id.* The Alabama court also found that the officers had failed to corroborate other details, including that the woman left from the particular

apartment identified by the tipster, that the woman left in the vehicle at the particular time identified by the tipster or that the woman was in possession of a brown attache case when she left the apartment. *See id.* In addition, the Alabama court found that “the officers viewed absolutely no suspicious conduct by [the defendant].” *Id.*

On appeal, the Supreme Court reversed the Alabama court’s decision, holding that “the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [the defendant’s] car.” 496 U.S. at 332. While the Supreme Court recognized “that not every detail mentioned by the tipster was verified,” the Court noted that the officers did corroborate that a woman left the apartment building in the described vehicle within the time frame predicted by the tipster and that she drove the most direct route to Dobby’s Motel. *Id.* at 331. In reversing the Alabama court’s decision, the Supreme Court stressed the importance of the tipster’s predictive information, stating “[w]hat was important was the caller’s ability to predict [defendant’s] *future behavior*, because it demonstrated inside information – a special familiarity with [defendant’s] affairs. . . . Because only a small number of people are generally privy to an individual’s itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual’s illegal activities.” *Id.* at 332. The Supreme Court concluded that “[w]hen significant aspects of the caller’s predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.” *Id.*

Here, as in *White*, the CS was able to accurately predict Scott's future behavior. The CS advised that Scott wanted to conduct the drug transaction with the CS at the Olive Garden parking lot in Manchester, that Scott would be at that location on October 18, 2007 at 10:00 a.m. to do the drug deal and that Scott would be a "passenger" in a "wagon." *See* JA at 81. When the officers arrived at the Olive Garden parking lot at approximately 9:50 a.m. on October 18, 2007, they observed a blue wagon. *See id.* They also observed Scott, who was standing next to the driver's side of the parked wagon and appeared to be speaking with the driver, who was later identified as the defendant. *See id.* These observations were consistent with, and indeed corroborated, significant information provided by the CS. Indeed, these observations revealed that the CS had correctly predicted Scott's future actions, thus demonstrating "a special familiarity with [his] affairs" and making it "reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities." *See White*, 496 U.S. at 332.

Implicit in the information from the CS that Scott would be a "passenger" in a "wagon" is that Scott would be with another person, namely, the driver of the wagon. As noted above, the officers' observations corroborated that the defendant went to the drug transaction with another person and that the person was driving the wagon. *See* JA at 82. At approximately the time and location that the drug transaction was to take place, Scott was standing next to and speaking with the driver of the wagon. *See* JA at 81-82. This supports an inference that the driver – who

was subsequently identified as the defendant – was involved in Scott’s narcotics trafficking.² *See United States v. Delossantos*, 536 F.3d 155, 161 (2d Cir.), *cert. denied*, 129 S. Ct. 649 (2008) (crediting evidence that “a drug dealer rarely brings along an uninvolved bystander during drug deals or speaks about the details of transactions in the presence of the bystander, even in code”). In addition, the CS reported that the transaction was to occur at a very specific time and arranged to call Scott on his cell phone around that time. When the CS called Scott, the fact that Scott answered this call in the presence of Rivera supports the inference that Rivera was involved. *See* JA at 82. *See also United States v. Martinez-Molina*, 64 F.3d 719, 729 (1st Cir. 1995) (dismissing the notion that “officers in the field are required to divorce themselves from reality or to ignore the fact that ‘criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger-than-necessary audiences’”) (quoting *United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir. 1992)).

As the Supreme Court concluded in *White*, where, as in this case, “significant aspects of the [informant’s] predictions were verified, there was reason to believe not only that the [informant] was honest but also that he was

² The district court also noted that, at the time in question, the Olive Garden parking lot was relatively empty because the restaurant was closed, thus making it somewhat less likely that members of the public who were not involved in the transaction would be present. JA at 88.

well informed, at least well enough to justify the stop.” 496 U.S. at 332. Accordingly, as the Supreme Court held in *White*, “under the totality of the circumstances the [informant’s] tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [the defendant’s] car.” *Id.*

Indeed, if anything, the police had a stronger basis to conduct an investigatory stop of the defendant’s vehicle in this case than in *White*. As an initial matter, unlike the completely anonymous tipster in *White*, the CS was a cooperating source – that is, someone “who may be held accountable if his allegations turn out to be fabricated.” *Elmore*, 482 F.3d at 180. In addition, in *White*, the tipster did not provide a physical description of the named person; nor were the police able to corroborate that the woman in the vehicle was Vanessa White (*i.e.*, the woman to whom the informer referred) prior to the investigatory stop. *See White*, 550 So.2d at 1079. Here, in contrast, the CS provided a detailed description of the defendant’s associate (*i.e.*, Scott) and, when the police arrived at the Olive Garden restaurant, they positively identified Scott. *See JA* at 81-82. Moreover, unlike *White*, the police had corroborated significant additional information provided by the CS – namely, that Scott was a convicted felon that had escaped from a halfway house. *See JA* at 81. Whereas the police in *White* stopped the defendant’s car on the road leading to the Dobey Motel within the general time frame predicted by the tipster, in this case the police found Scott and the defendant at the specific location (*i.e.*, the Olive Garden restaurant) and time (*i.e.*, 10:00 a.m.) that the drug transaction was to take place. *See JA* at 81-82. Further, as

the district court noted, when the CS telephoned Scott at the prearranged time and location for the drug transaction, Scott answered the call in the presence of the defendant. *See* JA at 87-88. In sum, the police had more than ample basis for the investigatory stop of the defendant and his vehicle.

In fact, based on the totality of the circumstances, the police arguably had probable cause to believe that the crack cocaine was in the wagon when they first approached Scott and the defendant. As the district court stated, “[i]ndeed, some courts have found probable cause to be present in circumstances that are difficult to distinguish from the facts of this case. *See United States v. Moreno*, 897 F.2d 26, 31-32 (2d Cir. 1990) (holding that the defendant’s companionship with an individual known to be transporting cocaine, together with the defendant’s nervousness and “odd” responses to officers’ questions, gave rise to probable cause to arrest), . . . ; *United States v. Patrick*, 899 F.2d 169, 171-72 (2d Cir. 1990) (holding that the discovery of cocaine in the defendant’s traveling companion’s purse, together with the fact that both individuals claimed to have accidentally crossed the border into Canada before returning to the United States, gave rise to probable cause to arrest the defendant).” JA at 89. Rather than rush to search the wagon, however, the officers proceeded in a non-intrusive and reasonable manner. The officers conducted an investigatory stop of the defendant and his vehicle to quickly confirm or dispel their suspicions in a non-intrusive manner, by having a drug-detecting dog sniff the exterior of the wagon.

In short, the district court correctly determined that the police had reasonable suspicion to support a *Terry* stop of the defendant and his vehicle. The Court should therefore affirm the district court's decision that the investigatory stop of the defendant and his vehicle was supported by reasonable suspicion.

II. The district court did not abuse its discretion in denying the motion to suppress without an evidentiary hearing because the facts were not in dispute.

A. Relevant facts

The relevant facts are set forth in the Statements of Facts above.

B. Governing law and standard of review

1. Law relating to the need for a hearing

A defendant seeking the suppression of evidence is not automatically entitled to an evidentiary hearing. This Court has noted that an evidentiary hearing on a motion to suppress is ordinarily required if the “moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that *contested issues of fact* going to the validity of the search are in question.” *United States v. Watson*, 404 F.3d 163, 167 (2d Cir. 2005) (citing *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992)) (emphasis added). *See United States v. Warren*, 453 F.2d 738, 743 (2d Cir. 1972) (upholding denial of motion to suppress without an evidentiary hearing when the issue

was one of law and facts alleged by the defendant would not have justified suppression); *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969) (upholding denial of evidentiary hearing when the defendant’s affidavit stated merely that he believed his arrest was without probable cause); *Grant v. United States*, 282 F.2d 165, 170 (2d Cir. 1960) (stating that “evidentiary hearings should not be set as a matter of course, but only when the petition alleges facts which if proved would require the grant of relief”).

2. The standard of review

A district court’s decision not to hold an evidentiary hearing on a motion to suppress evidence is reviewed for abuse of discretion. *Pena*, 961 F.2d at 339.

C. Discussion

The defendant argues that the district court abused its discretion by not holding an evidentiary hearing on the suppression motion. Def. Br. at 11-20. First, the defendant argues that because the defendant’s vehicle was searched without a warrant, the government bears the burden of proving that the search was consistent with the Fourth Amendment. Def. Br. at 11-16. Second, the defendant argues that, while he does not dispute the facts in the police reports, he does dispute the conclusions drawn from those facts. Def. Br. at 16. The defendant argues that an evidentiary hearing was necessary for the district court to rule on the motion to suppress. Def. Br. at 16-20.

As to the defendant's first point, "[i]t is well established that the burden of production and persuasion generally rest upon the movant in a suppression hearing." *United States v. Arboleda*, 633 F.2d 985, 989 (2d Cir. 1980) (internal quotations omitted). Further, as the defendant correctly notes, where, as here, a search was conducted without a warrant, the government bears the burden of persuasion that the search fell within at least one of the established exceptions to the warrant requirement. *See United States v. Mapp*, 476 F.2d 67, 76 (2d Cir. 1973).

This does not, however, mean that the defendant was entitled to an evidentiary hearing. Indeed, this Court has firmly recognized that a district court is "not required as a matter of law to hold an evidentiary hearing if [defendant's] moving papers did not state sufficient facts which, if proven, would have required the granting of the relief requested by [defendant]." *Culotta*, 413 F.2d at 1345 (citing *Grant*, 282 F.2d at 170), and Wright, Federal Practice and Procedure § 675 (1969)). Simply put, regardless of which party bears the burden of production or persuasion, there is no requirement for an evidentiary hearing if the facts are not in dispute. *See id.*; *Watson*, 404 F.3d at 167 (upholding denial of evidentiary hearing where even under facts as assumed by the movant, he was not entitled to relief); *Warren*, 453 F.2d at 743 (upholding denial of motion to suppress without an evidentiary hearing when the issue was one of law and facts alleged by the defendant would not have justified suppression); *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967) ("there was no factual issue to be resolved and the denial of a hearing was correct").

In *United States v. Mejia*, 953 F.2d 461 (9th Cir. 1991), for example, the Ninth Circuit found no abuse of discretion in the denial of an evidentiary hearing to a defendant who challenged a search based upon his wife's consent. In so ruling the Ninth Circuit noted:

[T]he purpose of an evidentiary hearing . . . is to resolve contested issues of fact going to the validity of the search Here, the contest is over the legal significance of undisputed facts rather than over the facts themselves. No doubt the officers, had they testified, would have relied on the police reports to refresh their recollection. The trial court's choice to rely on the police report was not an abuse of discretion.

953 F.2d at 466-67.

An evidentiary hearing need not be held unless the defendant's moving papers state facts which, if proven, would warrant the suppression of evidence. *See Warren*, 453 F.2d at 743; *see also United States v. Rodriguez*, 69 F.3d 136 (7th Cir. 1995) (upholding denial of evidentiary hearing on defendant's claim that police interview was an investigatory stop unsupported by reasonable suspicion because there was no dispute that required a hearing; the record showed that the agents identified themselves and asked to speak to the defendant and that the encounter was consensual); *United States v. Lewis*, 40 F.3d 1325, 1332 (1st Cir. 1994) ("district court was completely justified in refusing to hold an evidentiary hearing where the factual matters were essentially uncontested"); *United States v.*

Richardson, 764 F.2d 1514, 1527 (11th Cir. 1985) (upholding denial of evidentiary hearing when defendants alleged they were arrested without probable cause but “failed to make factual allegations which could form the basis for exclusion of evidence”).

In this case, the defendant has failed to identify any contested issues of fact going to the validity of the investigatory stop. In both his motion to suppress evidence and supporting memorandum of law, and in his reply to the government’s memorandum of law, the defendant failed to identify a single disputed issue of fact. Likewise, in his appellate brief before this Court, the defendant does not identify any contested issues of fact. Indeed, the defendant admits that he “does not dispute the facts contained in those [police] reports.” Def. Br. at 16. Rather, the defendant argues that he “dispute[s] the conclusions drawn from those facts.” *Id.* As the district court correctly ruled, absent a showing by the defendant that there are factual disputes related to the investigatory stop, an evidentiary hearing was not required. *See* JA at 100. *See also* *Watson*, 404 F.3d at 167; *Culotta*, 413 F.2d at 1345.

Accordingly, the district court did not abuse its discretion in denying an evidentiary hearing.

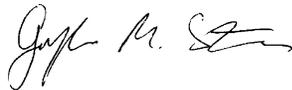
CONCLUSION

For the foregoing reasons, the judgment of the district court denying the motion to suppress should be affirmed.

Dated: July 24, 2009

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

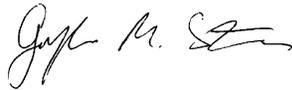
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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,086 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "Geoffrey M. Stone". The signature is fluid and cursive, with the first name being the most prominent.

GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

ADDENDUM

The Constitution of the United States of America

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.