12-2393

To Be Argued By:
CHRISTOPHER M. MATTEI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-2393

UNITED STATES OF AMERICA,
Appellee,

-vs-

HOPETON WIGGAN, also known as "Hope,"
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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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.

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 12, 2012. Appendix ("A__") 14. On June 13, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A14. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Whether the police had reasonable suspicion to conduct an investigatory stop of the defendant, where they substantially corroborated an anonymous complaint that the defendant possessed a firearm, identified the defendant as the subject of the tip, saw the defendant make suspicious movements and then saw a firearm in the defendant's pocket.

II. (A) Whether this Court may review the district court's denial of the defendant's motion to re-open the suppression hearing when the defendant did not preserve that issue for appeal.

(B) Whether the district court properly exercised its discretion to deny the motion to re-open when the court concluded that the evidence would be neither helpful nor appropriate.

III. Whether the defendant's prior convictions for (a) first-degree robbery, (b) conspiracy to commit first-degree robbery, and (c) assault on a peace officer qualified as violent felonies under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

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Preliminary Statement

On October 25, 2008, two New Haven police officers questioned the defendant, Hopeton Wiggan, in a barbershop after receiving information suggesting that he was carrying a gun. When they saw a gun in Wiggan's pocket, they handcuffed him and removed him from the barbershop. Once outside, the officers seized the loaded gun and arrested Wiggan.

Wiggan pled guilty to unlawful possession of ammunition by a convicted felon, and after the district court concluded that he had at least three prior convictions for violent felonies, the court sentenced Wiggan to 180 months' imprisonment as an Armed Career Criminal.

On appeal, Wiggan first challenges the district court's denial of his motion to suppress, but as set forth below, the police conducted a lawful investigatory stop, supported by reasonable, suspicion that Wiggan was engaged in criminal activity. Second, Wiggan argues that the court should have granted his motion to re-open the suppression hearing, but Wiggan did not preserve this issue for appeal, and the district court did not abuse its discretion in denying this motion in any event. Finally, Wiggan also challenges his sentence, arguing that the district court erred in sentencing him to 180 months' imprisonment under 18 U.S.C. § 924(e). As explained below, however, Wiggan had at least three prior convictions for violent felonies and thus he was properly sentenced as an Armed Career Criminal.

The district court's judgment should be affirmed.

Statement of the Case

On January 25, 2009, a federal grand jury returned an indictment charging Wiggan with one count of unlawful possession of ammunition by a

convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e), and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D). A2, A16-17. On September 11, 2009, Wiggan moved to suppress all evidence seized from him on the day of his arrest. A4. On January 22 and 26, 2010, the district court (Underhill, J.) held an evidentiary hearing on Wiggan's motion to suppress. A6. On July 8, 2010, the district court issued a written ruling denying Wiggan's motion to suppress. A7, A271. On July 23, 2010, Wiggan filed a motion to re-open the suppression hearing, which the district court denied by written ruling on October 5, 2010. A7-8, A320.

On January 14, 2011, Wiggan pleaded guilty to Count One of the Indictment, while reserving his right to appeal the district court's denial of his motion to suppress. A9, A366. On June 1, 2012, the district court sentenced Wiggan to 180 months of imprisonment. A14. Judgment entered June 12, 2012. A14. On June 13, 2012, Wiggan filed a timely notice of appeal. A14.

Wiggan is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

The defendant, Hopeton Wiggan, was arrested on October 25, 2008, when officers found him in a barbershop in possession of a loaded firearm. A278. On January 25, 2009, a federal grand

jury returned an indictment charging Wiggan with one count of unlawful possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e), and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D). A2, A16-17.

Wiggan moved to suppress the evidence found on him at his arrest, but the district court denied that motion. A4, A7, A271. On July 23, 2010, Wiggan filed a motion to re-open the suppression hearing, which the district court denied by written ruling on October 5, 2010. A7-8, A320.

Wiggan subsequently pleaded guilty to Count One of the Indictment, while reserving his right to appeal the district court's denial of his motion to suppress. A9, A366. On June 1, 2012, the district court sentenced Wiggan to 180 months of imprisonment after finding that Wiggan qualified as an Armed Career Criminal. A14.

Additional details relevant to Wiggan's suppression motion and sentencing are set forth below.

Summary of Argument

I. On October 25, 2008, New Haven police officers conducted a lawful investigatory stop of Wiggan based on their reasonable, articulable suspicion that he was engaged in criminal activity. The officers entered a small barbershop after

receiving an anonymous complaint that an individual named Hope was armed with a gun and had just entered the barbershop. Wiggan, who matched the description provided by the complainant, made a suspicious movement when the officers entered the barbershop. The officers approached Wiggan in the small shop and asked him to accompany them outside, and as he stood up, the officers saw a gun in Wiggan's pocket. At that point, the officers handcuffed Wiggan and removed him from the shop, where they seized the loaded gun and arrested Wiggan. The district court's factual findings on these points were not clearly erroneous.

Moreover, on this record, the district court properly found that Wiggan was not seized until the officers placed him in handcuffs after seeing a gun in his pocket. Until that time, Wiggan was free to ignore the officers and decline their requests. Furthermore, the seizure was lawful because the officers had reasonable, articulable suspicion that Wiggan was engaged in criminal activity. In particular, the officers had (1) a detailed tip from an anonymous complainant, which was corroborated in its entirety before the seizure, (2) Wiggan's suspicious conduct in the barbershop, and (3) the observation of an unsecured handgun in Wiggan's pocket. On these facts, the *Terry* stop was lawful. Finally, the officers' use of handcuffs during the stop was a

reasonable safety measure and did not transform the seizure into a *de facto* arrest.

II. The district court's ruling declining to reopen the suppression hearing is not properly before this Court because Wiggan did not preserve his appellate rights with respect to that decision in his plea agreement. In any event, the district court properly exercised its discretion to deny the motion because Wiggan made a strategic choice not to present the evidence at the suppression hearing, and the district court properly concluded that the proffered evidence would not affect its analysis.

III. The district court properly sentenced Wiggan under the Armed Career Criminal Act because he had at least three prior convictions for violent felonies. In particular, Wiggan's convictions for the following felonies qualified as violent felonies under 18 U.S.C. § 924(e): (1) first-degree robbery, (2) conspiracy to commit first-degree robbery, and (3) assault on a peace officer. Therefore, the district court's imposition of a 180-month term of imprisonment was proper and required by law.

Argument

I. The officers conducted a lawful investigatory stop of Wiggan.

A. Relevant facts

1. The motion to suppress

On September 11, 2009, Wiggan filed a motion to suppress evidence pursuant to the Fourth Amendment. A4. In support of his motion, Wiggan argued that police officers lacked reasonable suspicion to conduct a *Terry* stop in the barbershop and that the discovery of evidence on him resulted from that illegal detention. In the alternative, Wiggan argued that the evidence should be suppressed because, even if the officers initially possessed the requisite reasonable suspicion to justify a *Terry* stop, their subsequent actions resulted in a *de facto* arrest that was not supported by probable cause.

During a two-day suppression hearing, the court considered the following evidence:[1]

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[1] At the hearing, the government presented the testimony of Detective Carlos Roman and Sergeant Anthony Zona and approximately 16 exhibits. Wiggan presented the testimony of George Blackwell, Rodney Tucker and Special Agent Kurt Wheeler of the Bureau of Alcohol, Tobacco, Firearms and Explosives, along with 18 exhibits. Further, Wiggan testified on his own behalf. The government does not summarize the testimony of Sergeant Zona or Agent Wheeler.

a. Detective Carlos Roman

Roman was an experienced and decorated patrol officer. A275. On October 25, 2008, Roman was on patrol when, at 8:40 a.m., a New Haven Police Department ("NHPD") dispatcher relayed the following information to Roman:

> Lombard and Rowe. Male just went into the barbershop. Anonymous [complainant]. Said, "It's a black male. His name is Hope. Wearing a blue sweater, blue jeans and a blue zip-up hoodie. The jeans have designs on the back pocket. Says he has a [firearm] in his pocket. That's all I have, and no call back.

A31. Upon receiving this call, Roman went to the intersection of Lombard and Rowe Streets. A34. After arriving at the intersection but before going into Moe Love's Barbershop, which is located at that intersection, Roman called the NHPD dispatcher (at 8:43 a.m.) to confirm the description he had received. A272.

Roman and Officer Diego Quintero, who arrived immediately after Roman, then went to the front entrance of Moe Love's barbershop. A272.

The district court did not rely on Zona's testimony and relied on Wheeler's testimony only with respect to the issue of Zona's credibility. A274. Likewise, the government does not summarize Wiggan's testimony because the district court did not rely on it in determining whether his rights were violated. A275.

Roman entered the barbershop first, followed by Quintero. A36. The barbershop was small, narrow and cluttered, approximately 7 to 10 feet in width, and 20 to 30 feet in length. A36. Roman saw a rear hallway leading away from the service area of the barbershop. A37. From Roman's perspective as he entered the shop, customer chairs were located along the right-hand wall and at least two chairs were positioned along the left-hand wall. A38, A76-79. When Roman entered the barbershop, he saw several people in the shop: two barbers, each of whom was cutting the hair of a customer along the left-hand wall, an individual to his right, sitting near the window, and a little boy. A38.

Finally, Roman saw Wiggan sitting in the last chair along the right-hand wall in the rear of the barbershop. A38, A77-78. Roman noted that Wiggan was a black male, and that he was wearing blue jeans and a blue hoodie. A40. Wiggan's physical appearance was significant to Roman because Wiggan appeared to match the complainant's description of the individual who was allegedly in possession of a firearm. A40-41.

In addition to noting Wiggan's physical appearance, Roman also noted that as soon as he entered the barbershop, Wiggan quickly changed his position from a slouched to an upright position. A39. This movement appeared suspicious to Roman because it suggested to him that Wiggan was "looking to exit, like he wanted to leave."

A40. Roman then saw Wiggan look toward the rear of the barbershop, look back toward the officers, then again look toward the rear of the barbershop. A41. Based on Roman's experience, Wiggan's act of looking back and forth between the rear of the barbershop and the officers suggested to Roman that Wiggan was looking for a rear exit because he did not want to be in the presence of a police officer. A42.

In an effort to identify the subject of the complaint, Roman then asked, "[i]s anybody named Hope." A42. In response to that question, Wiggan raised his right hand, and said, "I'm Hope." A43, A179-80. The manner in which Wiggan raised his hand suggested to Roman that he was reluctant to identify himself, but did so anyway. A44.

Upon hearing Wiggan's statement that he was "Hope," Roman walked quickly toward Wiggan, followed by Quintero. A44-45, A105-06. As Roman approached Wiggan, he noted that Wiggan bore a concerned facial expression. A45. Roman stopped approximately two feet from Wiggan, with Wiggan facing him while seated in the chair. A46. Roman saw that Wiggan's pants were slung below his waist, so that his belt-line was at the same level as his groin. A49. Then, in a calm and normal tone, Roman asked Wiggan, "Sir, can you step outside with me please." A46. Roman made this request for two reasons. First, Roman concluded that, given the confines of the barber-

shop and the presence of several other people, including a young child, it would be safer to investigate whether Wiggan was armed outside. A48. Second, Roman wanted to continue his investigation outside in order to spare Wiggan any embarrassment if the complaint turned out to be groundless. A48-49.

Following Roman's request, Wiggan began to stand up. A49. As Wiggan stood up, Roman saw a brown pistol grip protruding from Wiggan's right front pants pocket. A49. Roman immediately alerted Quintero to the presence of a firearm by stating, "75, 75," and simultaneously took hold of Wiggan's right arm. A49-50. Quintero took hold of Wiggan's left arm, and Wiggan was then handcuffed. A50. It was significant to Roman that the firearm was loose and exposed in Wiggan's pocket, because, in his experience, that type of storage is typically employed by people who are in possession of a firearm illegally. A56-57.

Roman estimated that only seconds elapsed between the moment the officers entered the barbershop and the moment Roman saw the firearm and took hold of Wiggan's right arm. A54. Although Roman was armed throughout the encounter with Wiggan, at no time did Roman handle or gesture toward his firearm in any way. A59.

The officers walked Wiggan out of the barbershop, positioning themselves on either side of

him. A54. Once outside the barbershop, Roman recovered a loaded Colt .45 caliber pistol from Wiggan's right front pants pocket. A59-60. One round of ammunition was loaded in the firing chamber. A59-60. Roman asked Wiggan whether he had a permit to carry the firearm, to which Wiggan responded that he did not. A61. Quintero then frisked Wiggan for additional contraband, seizing $1,348 in U.S. currency from Wiggan's left front pants pocket; about 12 ounces of marijuana from his rear left pants pocket; and a digital scale from his right rear pants pocket. A62.

b. George Blackwell

Blackwell testified that on October 25, 2008, he and his young son were at Moe Love's Barbershop to get their hair cut. A157. Blackwell saw Wiggan enter the barbershop and sit two chairs down from him. A160. Blackwell and Wiggan, who was sitting in a slouched position, engaged in conversation. A176. Wiggan was wearing, "jeans" with designs on the back pockets and a "hoodie jacket." A162. The jeans were not "that baggy," but were "loose" fitting. A164.

At some point after Wiggan's arrival, two police officers entered the shop. A164. The officers' entrance startled Blackwell and he became concerned for his son. Government's Appendix ("GA") 1; A180-81. When the officers entered, "they . . . asked 'who's Hope' or '[a]nybody here

named Hope?'" A166, A178. Blackwell could not remember whether the officers waited for a response, but it appeared to him that the officers already knew Wiggan because they walked straight toward him. A164.

Blackwell was looking at the officers as they entered, and glanced back and forth between the officers and his son as the officers approached Wiggan. A178-81. As the officers approached Wiggan, the shorter officer, who had a hand on his holstered firearm, said "[g]et your hands out of your pockets." A166, A176. When the officers arrived in front of Wiggan, Blackwell continued to look back and forth between Wiggan and the officers because he wanted to make sure his son was all right. A180-81. The taller officer was behind the shorter officer, and both were standing between Blackwell and Wiggan. A184. Blackwell could not see Wiggan's right leg. A188. According to Blackwell, when the shorter officer arrived in front of Wiggan, he said, "[s]tand up, you're under arrest," handcuffed him and took him outside. A166-68, A171. Blackwell described the officer's voice as "boisterous" and "louder than normal." A167-68. Blackwell estimated that three to five minutes elapsed from the time the officers entered the shop until they handcuffed Wiggan. A166.

c. Rodney Tucker

Tucker was a barber at Moe Love's Barbershop and was working on the morning of October 25, 2008. A196. That morning, Wiggan entered the shop wearing a "hoodie," or baggy sweatshirt. A198-99. Wiggan sat in the rear of the barbershop beyond Tucker's barber chair. A198, A273.

At some point after Wiggan's arrival, two police officers entered the barbershop. A200. The officers asked, "Who's Hope?" A200. Tucker was looking at the officers when they entered the shop. A206. Tucker was not looking at Wiggan. A207. The officers then began to approach Wiggan, and Tucker returned to cutting his customer's hair. A208. As the officers approached Wiggan, one of them said in a voice that was "a little raised," "[a]re you Hope? Get your hand out of your pocket. Stand up, turn around. You're under arrest." A200. When the officers arrived in front of Wiggan, Tucker looked at the officers, who were between him and Wiggan. A210. Tucker could not see Wiggan's right leg, and was not in a position to see what the officers were looking at. A210. The officers then handcuffed Wiggan and walked him out of the barbershop. A200.

2. Ruling on the motion to suppress

The district court issued a ruling denying Wiggan's motion to suppress. A271. In support of

that ruling, the district court made multiple factual findings:

First, the district court described the facts leading up to Roman's encounter with Wiggan. The court found that at 8:40 a.m., Roman had received details about an anonymous complaint from the NHPD dispatcher stating that a "black man named 'Hope' was carrying a gun in his pocket." A271-72. The anonymous complaint described "Hope" as "wearing a blue sweater, blue jeans with a design on the back pocket, and a blue hooded sweatshirt," and further stated that Hope had gone into a barbershop at the intersection of Lombard and Rowe. A272. Roman drove to the corner of Lombard and Rowe, and at 8:43 a.m., before he entered the barbershop with Officer Quintero, he confirmed the complainant's description of the individual in question with the NHPD dispatcher. A272.

The district court continued by describing the scene that the officers observed when they entered the barbershop. Roman entered first, followed by Quintero. A272. As the court noted, "[t]he barbershop was narrow, perhaps seven to ten feet in width":

> Along the left wall were four cutting stations; a barber named Kim Graham was cutting a boy's hair in the chair closest to the door, while Rodney Tucker, another barber, was cutting a customer's hair two chairs down. Graham and Tucker were

> standing and their customers were sitting on chairs pulled away from the left wall. On the right side of the shop were chairs for waiting customers; there was approximately two to three feet of space between those waiting chairs and Graham and Tucker's barber chairs. (Tr. 303.) Near the front door sat George Blackwell, whose son was receiving a haircut from Graham. Farther down, just beyond Tucker's work station, sat Hopeton Wiggan. He wore a baggy pair of jeans and a large blue hooded sweatshirt. Roman also testified that, in addition to the people sitting on both sides of the narrow room, the barbershop was cluttered with furniture and debris.

A272-73 (footnote omitted).

The district court next described what happened as the officers entered the shop:

> Upon entering Moe Love's, Officer Roman asked in a commanding tone of voice whether anyone there was named "Hope." Tucker and Blackwell turned their heads to look at the officers. Wiggan, who had been slouching, jerked his body up, raised his hand, and identified himself as Hope. Roman and Quintero then began to walk over to Wiggan's seat, with Quintero trailing Roman closely. Blackwell turned to look back at his son and remembers seeing Graham continuing to cut his son's hair.

> Tucker also returned his attention to his customer as Roman and Quintero approached Wiggan.

A273.

The district court acknowledged that Roman and Blackwell and Tucker gave conflicting testimony concerning the sequence and nature of events following the officers' entrance. A273. The district court described each witness's testimony and considered the parties' challenges to each witness's credibility and impartiality. A273-77. The district court concluded that Roman, Blackwell and Tucker were credible. A275. However, because of the speed with which events inside the shop unfolded, and the fact that Blackwell and Tucker were admittedly distracted, the district court found that their accounts of what transpired as the officers approached Wiggan were not reliable. A278. The district court explained:

> As the officers neared Wiggan, Blackwell turned to his son in order make sure he was secure, and Tucker looked at his customer, perhaps out of respect or even embarrassment for Wiggan while he was being confronted by police. . . . Roman's initial questioning and the officers' eventual handcufffing of Wiggan happened fast—literally, in a matter of seconds—and were quick enough for witnesses to miss material details if they were turned away.

A277-78 (footnote omitted). As the court further explained, it was the speed of the events that led him to discount part of Blackwell's testimony:

> It is because of the speed with which the events unfolded that I do not credit Blackwell's testimony that Roman ordered Wiggan to get his hands out of his pockets while the officers approached Wiggan. (Tr. 263.) Blackwell admitted to turning his head away while the officers proceeded down Moe Love's aisle (Tr. 277), and therefore was not in the best position to observe where Roman was when he uttered his commands to Wiggan.

A278 n.6. Given the court's concern about the reliability of the testimony from Blackwell and Turner on the topic, the court made the following findings:

> [A]s a matter of factual finding, I have determined that Roman's commands to Wiggan [to stand up, turn around, and take his hands from his pockets] occurred *after* Roman asked Wiggan to step outside and saw the gun in Wiggan's pants pocket. Roman issued that command, in other words, in the course of physically restraining Wiggan. Roman's statements are therefore not relevant to the question whether a seizure occurred before Wiggan was handcuffed.

A282 n.7.[2]

Having found Roman, Blackwell and Tucker credible to varying degrees, the district court synthesized their non-conflicting testimony as follows:

> When Officers Roman and Quintero entered Moe Love's barbershop, Roman asked "Who's Hope?" Wiggan responded by raising his hand and identifying himself. He shifted his body and looked briefly over his right shoulder. Roman and Quintero walked briskly and purposefully past Blackwell and Tucker, covering a distance of no more than 25 feet, until they stopped immediately in front of Wiggan. While he walked, Roman had his hand close to or on his service weapon. As the officers neared Wiggan, Blackwell turned to his son in order to make sure he was secure, and Tucker looked at his customer, perhaps out of respect or even embarrassment for Wiggan while he was being confronted by police. Roman then asked Wiggan to step outside for questioning. As Wiggan began to rise, Roman saw the brown pistol grip sticking out of Wiggan's right front pants pocket.

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[2] In its ruling denying Wiggan's motion re-open the suppression hearing, the district court explicitly reaffirmed its analysis of this conflicting testimony. A321.

At that point, Roman yelled "75!" and then loudly ordered Wiggan to stand and keep his hands away from his pockets. Roman proclaimed that Wiggan was under arrest, and he and Quintero handcuffed Wiggan. Blackwell and Tucker then looked back to see Wiggan handcuffed and being taken out. Roman's initial questioning and the officers' eventual handcuffing of Wiggan happened fast—literally, in a matter of seconds—and were quick enough for witnesses to miss material details if they were turned away.

The ensuing events were uncontested. As the officers led Wiggan out of the barbershop, Quintero asked him whether he had "anything" on his person. Wiggan responded, "I have a gun," and then said "I'm hit, I'm hit." (Tr. 63-64.) Outside of Moe Love's, Roman and Quintero searched Wiggan's front right pants pocket and retrieved a loaded Colt .45 caliber pistol. (Tr. 66.) Roman radioed NHPD that the gun was secure. He then asked Wiggan whether he had a permit for the weapon; Wiggan admitted that he did not. (Tr. 67-68.) The officers placed Wiggan under arrest for possession of a concealed weapon without a permit and searched Wiggan's person. That search incident to arrest yielded a

> large plastic bag of marijuana, a scale, and $1,348 in cash.

A277-78 (footnote omitted).

The district court then considered whether, under these circumstances, when the police approached Wiggan in the barbershop, they "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." A281 (internal quotation marks omitted). The district court initially considered (1) the relatively small quarters of the barbershop, (2) the close proximity of the officers to Wiggan, including the fact that they blocked Wiggan's route to the exit, (3) the close proximity of Roman's hand to his firearm, (4) the officers' swift and purposeful approach to Wiggan, and (5) Roman's request that Wiggan accompany the officers outside. A281-86. Citing *United States v. Drayton*, 536 U.S. 194, 200 (2002) and *Florida v. Bostick*, 501 U.S. 429, 435 (1991), the district court concluded that these facts, standing alone or in conjunction did not establish a seizure. A281-86. The district court noted that it did not credit testimony offered by the defense that Roman ordered Wiggan to "stand up, turn around, and take his hands away from his pockets," prior to Roman's observation of the firearm. A282. Therefore, the district court concluded that, as of the moment Roman observed the firearm protruding from Wiggan's pocket, Wiggan was not seized. The seizure oc-

curred immediately thereafter when the officers "placed [Wiggan] in handcuffs," following their observation of the firearm. A286.

Further, citing *United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990) and *United States v. Perea*, 986 F.2d 633, 645 (2d Cir. 1993), the district court held that the officers' use of handcuffs did not transform the *Terry* stop into a full custodial arrest:

> [T]here should be nothing controversial about police officers using more restraining techniques in the course of performing a *Terry* stop when there is reasonable suspicion that a suspect is carrying a firearm. . . . Roman observed what appeared to be a pistol grip in Wiggan's pants pocket and therefore had a direct evidentiary basis for concluding that Wiggan was engaged in unlawful conduct—i.e., illegal possession of a concealed weapon—and posed an immediate safety risk.
>
> * * *
>
> It was only after the gun was retrieved and Wiggan remained in cuffs and was further searched that the seizure became an arrest—an arrest that, following the discovery of Wiggan's weapon, was undoubtedly supported by probable cause.

A288-91.

Having determined that the *Terry* stop began when the officers placed Wiggan in handcuffs, the district court had little difficulty concluding that the officers had reasonable suspicion for that stop. In particular, the court noted the following facts supported the officers' reasonable suspicion: (1) the officer's corroboration of material aspects of the anonymous tip; (2) Wiggan's suspicious movements and gestures upon encountering the officers; and (3) Roman's observation of an unsecured firearm in Wiggan's pants pocket. A291-93. Citing several of this Court's unpublished opinions, including *United States v. Lucas*, 68 Fed. Appx. 265 (2d Cir. 2003) and *United States v. Manuel*, 64 Fed. Appx. 823 (2d Cir. 2003), the district court concluded that the *Terry* stop was justified because "it was fair for the officers to presume that Wiggan's gun possession was unlawful, especially when coupled with the suspicious way he carried it and comported himself." A293. Finally, the court noted that even if Wiggan was arrested when he was handcuffed, the officers had probable cause to believe that Wiggan's gun possession was illegal. A293.

B. Governing law and standard of review

1. Consensual police encounters

Certain encounters between police and citizens do not require any justification at all because they do not intrude upon any Fourth

Amendment protections. For example, "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *Drayton*, 536 U.S. at 200 (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983)). In fact, "police officers enjoy the liberty possessed by every citizen to address questions to another person." *United States v. Hooper*, 935 F.2d 484, 490 (2d Cir. 1991) (quoting *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.) (internal quotations and ellipses omitted)). *See also Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.) ("[C]haracterizing every street encounter between a citizen and the police as a seizure . . . would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices."). "The fact that an individual is more likely to respond to a law enforcement officer than to another individual hardly eliminates the consensual nature of the response." *Hooper*, 935 F.2d at 491 (internal quotation omitted).

"Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." *Drayton*, 536 U.S. at 201 (citing *Bostick*, 501 U.S. at 435). An officer may also ask an in-

dividual to accompany him to a different location, and the fact that the individual freely complies does not, without more, implicate the Fourth Amendment. *See Hooper*, 935 F.2d at 489-92 (no seizure where DEA agents identified themselves, asked to speak with the defendant, and suggested that they move to a "less congested area"); *United States v. Torres*, 949 F.2d 606, 608 (2d Cir. 1991) ("[W]e do not believe that a law enforcement officer's request to step inside a police office without more transforms an otherwise consensual encounter into a fourth amendment seizure."); *United States v. Springer*, 946 F.2d 1012, 1016 (2d Cir. 1991) (no seizure where defendant attempted to avoid police contact, was approached by an officer who displayed badge, asked to speak to him, and then requested that he "step away from the taxi stand and the curb").

In *Drayton*, the Supreme Court held that three police officers, who boarded a bus, identified themselves as police officers, announced that they were seeking to interdict drugs, and asked passengers for permission to search their luggage while one officer was positioned at the front of the bus, did not implicate a Fourth Amendment interest. 536 U.S. at 197-200, 203-206. In reaching that conclusion, the Court found it significant that, "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not

even an authoritative tone of voice." *Id.* at 204. The Court noted that the fact that officers approached individuals in the restricted physical confines of a bus "says nothing about whether the police conduct is coercive," because to the extent a "bus rider's movements are confined . . . this is the natural result of choosing to take the bus." *Id.* at 201-02. This was true even though the officers positioned themselves only 12-18 inches from the defendant when they asked to search his bags, and one officer was positioned at the front of the bus. *See id.* at 197-98. The Court commented that the fact that police officers are often armed and in uniform during such encounters "should have little weight" when evaluating whether a reasonable person would feel free to decline officers' requests or terminate the encounter. *Id.* at 204. Likewise, the Court noted that "the presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.* at 205.

This Court has also articulated factors that are relevant to the inquiry of whether a police encounter requires justification under the Fourth Amendment. These factors include:

> the threatening presence of several officers; the display of a weapon; physical touching of a person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged

> retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to a police station or police room.

Hooper, 935 F.2d at 491 (quoting *United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990)). *See Torres*, 949 F.2d at 607-08 (no seizure where officer approached defendant in public bus terminal, identified himself as a DEA agent investigating narcotics trafficking, asked defendant whether she was carrying narcotics, asked defendant to accompany him to transit police office and asked permission to search bag); *Springer*, 946 F.2d at 1014 (no seizure where two officers approached defendant on sidewalk, identified themselves as police officers, asked defendant for identification, asked defendant general questions about his activities, asked him to step away from curb to a partition in front of bus terminal, advised him that they were investigating narcotics trafficking, and asked to search his luggage).

2. Investigatory stops

In *Terry v. Ohio*, 392 U.S. 1 (1968), 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. Accordingly, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspi-

cion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30).

"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 that for probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also United States v. Arvizu*, 534 U.S. 266, 274 (2002) (same). The ultimate test in evaluating whether an encounter between a police officer and a citizen implicates the Fourth Amendment is "whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. "This 'reasonable person' test presupposes an *innocent* person." *Id*. at 438.

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). 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)).

"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). "[I]f an informant's declaration is corroborated in material respects, the entire account may be credited, including parts without corroboration.'" *United States v. Wagner*, 989 F.2d 69, 73 (2d Cir. 1993). For example, where police, in an attempt to corroborate an anonymous informant, observe conduct that rouses their suspicion, such conduct may bolster the reliability of the initial tip and provide an independent basis for the seizure. *See United States v. Bold*, 19 F.3d 99, 103 (2d Cir. 1994). In addition, where an informant's tip provides a high-degree of specificity, even about innocent details, that specificity suggests that the informant possessed first-hand knowledge. *See United States v. Walker*, 7 F.3d 26, 30 (2d Cir. 1993) (affirming denial of motion to suppress where district court concluded "it was 'apparent' from an anonymous tipster's "description that [the tipster] knew [the defendant]").

3. Standard of review

In reviewing the denial of a suppression motion, this Court 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. Ferguson*, 702 F.3d 89, 93 (2d Cir. 2012), *pet'n for cert. filed*, Feb. 22, 2013. The Court reviews *de novo* "whether the Fourth Amendment was violated and whether there was reasonable suspicion to justify a *Terry* stop." *Lucky*, 569 F.3d at 105-106.

C. Discussion

1. The district court's factual findings were not clearly erroneous.

At the outset, it is important to note that Wiggan does not challenge certain key findings of the district court. In particular, the following findings by the district court are undisputed:

- Upon entering the barbershop, Roman was able to corroborate material details of the anonymous complaint, including that an individual wearing blue jeans and a blue hooded sweatshirt was present inside Moe Love's Barbershop. A273.
- Roman inquired of the occupants whether any of them were named "Hope," and Wiggan

identified himself as "Hope," consistent with the anonymous complaint. A277.

- Wiggan shifted in his chair and briefly looked over his right shoulder upon encountering the police. A277.
- The officers were in uniform and Roman had his hand near his firearm.[3] A277.
- The officers walked purposefully and briskly toward Wiggan after he identified himself. A277.
- Blackwell and Tucker were looking at and focused on the police officers when the officers entered the barbershop, not Wiggan. GA1; A273, 277.
- As the officers approached Wiggan, Blackwell was looking toward his son out of concern for his safety and Tucker was looking at the customer seated in his barber chair. A277.

In seeking to establish that a seizure occurred before the officers saw the firearm, however,

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[3] The district court did not resolve the issue of whether Roman's hand was resting on his firearm or whether it was simply close to his firearm. In either case, the district court concluded that any gesture toward his firearm, if one occurred, was purely defensive and did not "effectively restrain Wiggan or force him to cooperate with the police." There was no evidence to the contrary. A277, A284-85.

Wiggan claims that the district court should have credited Blackwell's and Tucker's testimony that Roman gave Wiggan certain instructions as he approached Wiggan. Indeed, according to Wiggan, it was clear error not to do so.

There is no doubt that Blackwell's and Tucker's testimony support Wiggan's argument. Blackwell testified that Roman instructed Wiggan to get his hands out of his pockets as Roman was approaching Wiggan. A176. He also testified that, upon arriving at Wiggan's location, Roman instructed Wiggan to stand up and turn around, though he conceded that he was not in a position to see whether a firearm was protruding from Wiggan's pocket. A175, A188. Tucker testified that Roman made similar comments "as they were walking," toward Wiggan. Further, neither Blackwell, nor Tucker recalled hearing Roman ask Wiggan to accompany him outside. A275.

The district court considered Roman's testimony along with Blackwell's and Tucker's testimony, and concluded that Blackwell and Tucker were not in a position to testify reliably concerning the sequence of events inside the barbershop because neither man was looking at the officers as they approached Wiggan and both men acknowledged that they were distracted during the key events, which unfolded rapidly. A278, A282, A321. In its ruling denying the motion to re-open the suppression hearing, the district court explained this finding as follows:

> I credited Roman's account with respect to whether he asked Wiggan to step outside and discredited Black's [sic] and Tucker's testimony that the officers only ordered Wiggan to stand up and submit to them without asking him to leave the barbershop voluntarily. In particular, I found that Black [sic] and Tucker were not in the best position to observe the interaction between Wiggan and the officers because they admitted that they were not watching the entire event unfold and the encounter, which lasted a matter of seconds, was fast enough for Black [sic] and Tucker to have missed crucial details.

A321 (internal record citations omitted).

There was ample support in the record for the district court's credibility determination on this point. Blackwell admitted that when he made his purported observations he was startled and concerned for his son. GA1; A180. He also testified that his concern for his son's safety compelled him to glance back and forth between the officers and his son. A180, A191. Blackwell's inability to perceive and recall events due to the startling nature of the experience was underscored by the fact that Blackwell estimated that the officers' encounter with Wiggan lasted three to five minutes when, in fact, the objective evidence established that the entire encounter lasted approximately 28 seconds. A166, A191, A277.

In short, the district court appropriately concluded that Blackwell's understandable preoccupation with his son's safety while in a state of surprise undermined the accuracy of his account.

Likewise, the district court's skeptical view of the reliability of Tucker's testimony was well founded. Tucker admitted that, as soon as he realized the officers had entered the shop, he looked down at his customer and continued to cut that customer's hair until Wiggan stood up, at which point Tucker looked over at Wiggan and the officers. A207-210. In other words, Tucker admitted that he was not in a position to see what was happening at the very moment he claimed to be hearing Roman issue certain commands to Wiggan.

In light of the foregoing, it was not clear error for the district court to credit Roman's testimony that he asked Wiggan to step outside the barbershop, saw the firearm as Wiggan voluntarily stood up, and then secured Wiggan in handcuffs for public safety reasons. *See United States v. Iodice*, 525 F.3d 179, 185 (2d Cir. 2008) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (internal quotation omitted). There is, thus, no basis to upset the district court's well-supported factual finding that "only after seeing the butt of [Wiggan's] pistol, [Roman] ordered Wiggan to stand up and keep his

hands out of his pockets." A323. *See Iodice*, 525 F.3d at 185 ("A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") (internal quotation omitted).

2. The police conducted a lawful *Terry* stop after seeing an unsecured gun in Wiggan's pocket.

a. The seizure occurred when the police handcuffed Wiggan immediately after seeing a gun in his pocket.

On the record before it, the district court properly concluded that the officers seized Wiggan for a *Terry* stop when, upon seeing a firearm protruding from Wiggan's pants pocket, they placed him in handcuffs. A286.

Here, two officers entered a small and narrow barbershop. A272. That only two officers were involved in this encounter suggests that this was not the type of "overwhelming show of force" or "threatening presence of several officers" that courts consider a significant indicator of coercion. *See Drayton*, 536 U.S. at 194 (referring to presence of three officers on a bus during questioning of passengers); *Lee*, 916 F.2d at 814 (no seizure where four officers, who had identified themselves as law enforcement officers, ap-

proached defendant in airport terminal). Although the officers were in uniform and armed, neither officer brandished his weapon or referenced them in any offensive or coercive way. A277, A284-85. Accordingly, these facts did not "establish the kind of coerciveness necessary to establish a seizure." A283. *See Drayton*, 536 U.S. at 205 ("The presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.").

Likewise, the district court properly determined that the close proximity between the officers and Wiggan and their position between Wiggan and the exit were "not dispositive" of the issue. A283. The district court appropriately cited Supreme Court authority rejecting the notion that an encounter is made more coercive because it occurs in confines that necessarily limit the defendant's movement. A283. *See Bostick*, 501 U.S. at 436; *Drayton*, 536 U.S. at 202. Here, Wiggan was located in a public space—the narrow confines of a small barbershop. In that context, the appropriate inquiry was not whether a reasonable person would have felt free to leave, but whether he "would [have felt] free to decline the officer's requests or otherwise terminate the encounter." *Drayton*, 536 U.S. at 202. Moreover, the Supreme Court has commented that in this type of setting, where others "are present to witness officers' conduct, a reasonable person may

feel even more secure in his or her decision not to cooperate with police . . . than in other circumstances." *Id.* at 204.

The only request made by Roman was that Wiggan step outside the barbershop to a public sidewalk. A277-78. *See Drayton*, 536 U.S. at 204 (no seizure, in part because there was "no threat, no command, not even an authoritative tone of voice"). Roman testified that he made the request so the officers could continue their investigation while minimizing the risk of potential danger to themselves and the innocent bystanders, including a small child, and to avoid any needless embarrassment to Wiggan. A48. As this Court has previously held, a request of this nature does not render an encounter coercive, particularly where the requesting officers have a valid reason for making it. *See Torres*, 949 F.2d at 607-08; *Springer*, 946 F.2d at 1016-17; *Hooper*, 935 F.2d at 487, 491; *Lee*, 916 F.2d at 819.

Here, Wiggan started to rise from his seat in response to Roman's request. At that moment, Roman observed the butt of a firearm protruding from Wiggan's pocket and secured Wiggan. Prior to that moment, the officers did not have any physical contact with Wiggan, had not made any offensive or threatening commands or gestures, had not asked him to present identification or any other personal effect, and had not asked him whether he possessed any contraband. Based on all the foregoing circumstances, the district court

properly concluded that up until the time the officers observed the firearm and physically secured Wiggan, a reasonable and innocent person would have felt free to decline Roman's request or simply terminate the encounter, *i.e.*, remain seated or seek to leave the barbershop.

b. The seizure was supported by reasonable suspicion that Wiggan unlawfully possessed a firearm.

Further, the district court properly concluded that at the moment the officers seized Wiggan, they possessed reasonable suspicion to conduct a brief investigatory stop. Roman, in light of his training and experience, reasonably suspected that Wiggan may have been engaged in unlawful activity, based on (1) a detailed tip from an anonymous complainant, which was corroborated in its entirety prior to seizure, that Wiggan was in possession of a gun and had just entered a particular barbershop; (2) Wiggan's suspicious movements upon encountering police and (3) Roman's actual observation of an unsecured firearm in Wiggan's front pants pocket.[4]

Here, the detailed anonymous complaint, combined with the officers' independent investi-

[4] Indeed, the district court observed that the officers likely possessed probable cause to arrest the defendant upon seeing the unsecured firearm in his pocket. A293 n.10.

gation, provided ample basis to reasonably suspect that Wiggan might be engaged in criminal activity. First, the anonymous tip itself, although just one component of the officers' reasonable suspicion, provided precise detail as to Wiggan's clothing (blue jeans with designs on the back pocket, a blue sweater and a blue zip up hoodie) and present location. Given that the anonymous complainant claimed knowledge of Wiggan's name and whereabouts, and such a minute detail as the back pocket designs on Wiggan's jeans, it would have been reasonable for the officers to conclude that the anonymous complainant was personally familiar with Wiggan and had seen him that morning. *See Walker*, 7 F.3d at 30 ("[I]t was apparent from [the anonymous tipster's] description that [the tipster] knew [the defendant]."") (internal quotations omitted). *Cf. United States v. Hernandez*, 85 F.3d 1023, 1028 (2d Cir. 1996) (noting that confidential informant's description of apartment was reliable in part because "[a] detailed eye-witness report of a crime is self-corroborating; it supplies its own indicia of reliability") (internal quotations omitted).

Moreover, the anonymous tip had additional reliability because the officers were able to confirm Wiggan's presence in the barbershop minutes after the anonymous informant advised that he had just entered the barbershop. *See United States v. Harrell*, 268 F.3d 141, 151 (2d

Cir. 2001) (Meskill, J., concurring) (explaining that *J.L.* did not abrogate *Bold* with respect to tips involving present activity).

Second, this is not a case, as in *Florida v. J.L.*, 529 U.S. 266 (2000) that rested on the mere fact of an anonymous tip. In *J.L.*, police received an anonymous tip that a black male wearing a plaid shirt was at a bus stop and in possession of a gun. *Id.* at 268. There was no record of how soon after receiving the tip the police arrived at the bus stop. *Id.* Once they arrived at the bus stop, the police made no independent observations or corroborated anything other than the fact that a black male wearing a plaid shirt was indeed present at the bus stop. *Id.* The black male did nothing to arouse the suspicions of the responding officers and made no unusual movements. *See id.* Here, by contrast, the officers made independent observations upon entering the barbershop that supported their reasonable suspicion. Unlike in *J.L.*, Roman made an inquiry as to whether anybody in the barbershop was named Hope. When Wiggan, who matched the description provided by the anonymous complainant, signaled that he was named Hope, the officers had corroborated every aspect of the anonymous tip except for Wiggan's possession of the gun. In addition, when the officers entered the barbershop, Wiggan changed his posture from a slouched position to an upright seated position. A227, A292. Wiggan also looked toward

the rear hallway of the barbershop. A277. Based on his experience, Roman interpreted these movements to suggest that Wiggan was uncomfortable in the presence of law enforcement and looking for an escape route.

Finally, prior to the seizure, Roman actually observed the butt of an unsecured firearm protruding from Wiggan's right front pants pocket. A278. The district court properly considered this fact together with the other circumstances discussed above, and noted that in a series of unpublished opinions, this Court had found similar circumstances sufficient to support reasonable suspicion. A292 (citing *Lucas*, 68 Fed. Appx. 265 and *Manuel*, 64 Fed. Appx. 823). *See also United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) ("reasonable suspicion that Orman was carrying a gun . . . quickly rose to a certainty when Orman confirmed that he was carrying a gun.").

Moreover, the district court sensibly observed that the manner in which Wiggan possessed the firearm supported a reasonable suspicion that his possession was unlawful. A282. Wiggan was carrying the firearm loose in his pocket, which was significant because, in Roman's experience, citizens who are in lawful possession of firearms tend to carry their firearms in a safely holstered position. A292-93. The fact that the firearm was exposed, rather than concealed, also suggested that Wiggan's gun possession was illegal because

the State of Connecticut issues permits for citizens to carry weapons in a concealed manner. A293. According to the district court, "it was fair for the officers to presume that Wiggan's gun possession was unlawful, especially when coupled with the suspicious way he carried it and comported himself." A293.

As he did below, Wiggan cites *United States v. Ubiles*, 224 F.3d 213, 215-18 (3d Cir. 2000) to support his argument that the officers lacked reasonable suspicion. In *Ubiles*, the Court held that police lacked reasonable suspicion to stop an individual based on an anonymous tip that the individual possessed a gun, where officers did not observe a gun and no other circumstances suggested any unlawful activity. *Id.* at 215-18. That case is inapposite here, where the district court found that Wiggan made suspicious movements upon seeing the police and that Roman observed an unsecured firearm in the defendant's pocket prior to seizing him. Those two key facts were not present in *Ubiles*. *See id.* at 215.

In sum, when the police substantially corroborated the anonymous complaint, identified Wiggan as the subject of that complaint, observed Wiggan engage in suspicious behavior and then saw an unsecured firearm in his pocket, they had ample reasonable suspicion to effect an investigatory stop.

c. The *Terry* stop did not evolve into a *de facto* arrest absent probable cause.

Wiggan next contends that, even if the district court properly concluded that the presence of a firearm justified a *Terry* stop, the use of handcuffs during that stop transformed the detention into an arrest requiring probable cause.

The district court properly rejected this argument below. Citing this Court's decisions in *Oliveira v. Mayer*, 23 F.3d 642, 646 (2d Cir. 1994) and *United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990), the district court observed that "there should be nothing controversial about police officers using more restraining techniques in the course of performing a *Terry* stop when there is reasonable suspicion that a suspect is carrying a firearm." A288. The district court's conclusion was well-founded.

The officers in this case had even greater reason to believe that Wiggan was armed, but nonetheless took less intrusive measures to effect the detention than did the agents in *Alexander*. *See Alexander*, 907 F.2d at 273 (although police lacked information that defendant was armed, agents' drawn weapons during seizure was reasonable and did not constitute an arrest because the defendant appeared to have just completed a drug transaction, was driving evasively, and numerous innocent by-standers were nearby). Here, Roman was informed that Wiggan had just

entered a barbershop carrying a gun. When Roman entered the barbershop, he saw that it was a cramped and narrow space, which would make any physical confrontation with Wiggan more dangerous. A36, A54. He also saw several innocent by-standers, including a small child. *See Alexander*, 907 F.2d at 273 ("[T]here was cause for added precaution because of the numerous innocent bystanders on the crowded city street."). As Wiggan became aware of the officers' presence, he made two physical movements that suggested he might attempt to escape. A41, A292. Finally, Roman actually saw an unsecured firearm protruding from Wiggan's pocket. A292.

Under these circumstances, it was more than reasonable to secure Wiggan in handcuffs and escort him a few feet to the sidewalk. By doing so, the officers limited Wiggan's access to a firearm that was, literally, inches from his hand. The officers then escorted Wiggan out of the barbershop, traveling a short distance from the rear of the barbershop to the sidewalk. In doing so, the officers not only protected the innocent bystanders from a potentially dangerous situation, but also mitigated the risk inherent in confronting the armed defendant in a tightly confined space. The district court properly described the officers' decision to restrain Wiggan and remove him from the shop as "justified" because they had a "reasonable basis for believing Wiggan

was armed and, therefore, potentially dangerous." A291.

While the dangerous circumstances supported the use of handcuffs, it is clear that the officers took only minimally intrusive steps to conduct their limited investigation. A290. The duration of the detention was extremely brief. Only seconds elapsed between the time Wiggan was initially detained within the barbershop and his arrest on the sidewalk. *See United States v. Vargas*, 369 F.3d 98, 102 (2d Cir. 2004) (use of handcuffs during *Terry* stop was reasonable where detention was "very brief"). This "swiftly developing" situation reasonably demanded that the officers restrain Wiggan in handcuffs. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985) (cautioning courts against second-guessing decisions made by officers during "swiftly developing" investigations); *United States v. Newton*, 369 F.3d 659, 673 (2d Cir. 2004) (even where six officers handcuffed a defendant in his home, Court "would not hesitate to rule" that the defendant was not subject to a *de facto* arrest under the Fourth Amendment).

Under these circumstances, the district court did not err in finding that handcuffing and escorting Wiggan out of the barbershop were reasonable measures designed to minimize the danger to the officers and the by-standers, while effecting the purpose of the detention, which was

to determine whether Wiggan illegally possessed the firearm.

II. The district court did not abuse its discretion in denying Wiggan's motion to re-open the suppression hearing.

A. Relevant facts

On July 23, 2010, Wiggan filed a motion to re-open the suppression hearing so that he could testify again and offer the testimony of two additional witnesses—Diego Quintero and Kimberly Graham—both of whom were available at the time of the suppression hearing. A7, A295, A297-300.[5] In support of this request, Wiggan proffered that he anticipated Quintero would testify that (1) he (Quintero) had his hand on his firearm during his interaction with Wiggan and (2) Roman asked Wiggan to stand up before he observed the firearm. A298. Wiggan claimed that Graham would offer testimony to corroborate Blackwell and Tucker. A300. Finally, Wiggan requested an opportunity to testify again in more detail about the extent to which he felt coerced by the arresting officers' actions. A301-02.

On October 5, 2010, the district court issued a written ruling denying Wiggan's motion to re-

[5] Wiggan's motion also asked the court to re-consider its original ruling. A320. On appeal, Wiggan only challenges the district court's denial of the motion to re-open.

open. A320. With respect to the proffered testimony of Quintero, the district court observed that its ruling denying suppression did not turn on whether the officers had their hands on their firearms. A322-23. Therefore, Quintero's testimony on that issue "would be cumulative and would not change [the district court's] ruling." A323. Similarly, the district court rejected Wiggan's suggestion that Quintero would corroborate the defense's account of the seizure, finding that Wiggan's proffer of Quintero's testimony was not only speculative, but would likely rebut Blackwell's and Tucker's testimony. A324. In particular, the district court concluded that, even if Quintero were to testify that Roman asked Wiggan to stand up, there was no evidence that Quintero would testify that that instruction preceded Roman's observation of a firearm. A324.

With respect to the proffer of Graham's testimony, the district court concluded that Graham's expected testimony would not be consistent with the narrative presented by Blackwell and Tucker, and would likely "serve only to insert confusion . . . [and] hamper Wiggan's case by introducing divergent accounts of the events surrounding his arrest that stand in unflattering contrast to the government's single, unified narrative." A324-25.

Finally, the district court rejected Wiggan's request to re-take the stand, finding that his testimony would suffer from a "credibility deficit" if

he were permitted to testify again, "having seen all of the testimony at the original suppression hearing and having read my ruling, which set forth the factual findings . . . ." A325. The district concluded that there were simply no "exceptional circumstances" to justify the "inappropriate" course suggested by Wiggan, *i.e.*, "give abbreviated testimony, obtain a suppression ruling, and then return to court to testify more fully in response to that ruling." A325.

B. Governing law and standard of review

A district court's denial of a motion to re-open a suppression hearing is reviewed for abuse of discretion. *See Bayless*, 201 F.3d at 131; *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 196 (2d Cir. 2008). "That 'standard accurately reflects the degree of deference properly accorded a district court's decision [ ] regarding evidentiary matters and the general conduct of trials.'" *United States v. Carthen*, 681 F.3d 94, 102 (2d Cir. 2012) (quoting *Bayless*, 201 F.3d at 131), *cert. denied*, 133 S. Ct. 837 (2013).

In determining whether to re-open a suppression hearing, the district court may consider whether the moving party can adequately justify its "delay" in offering certain evidence. *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 196-97. Ordinarily, a party's failure to explore fully issues and circumstances existing at the time of the initial hearing will be insufficient to justify re-opening. *See United States v. Tzakis*, 736 F.2d 867, 872 (2d Cir. 1984).

C. Discussion

As an initial matter, Wiggan failed to preserve his right to appeal the district court's denial of his motion to re-open. Here, Wiggan entered a conditional plea, specifically reserving in writing his right to appeal the "district court's July 8, 2010 Ruling on Motions to Suppress (Docket No.

64)." *See* A366; Fed. R. Crim P. 11(a)(2). He did not, however, specifically reserve his right to appeal the district court's separate ruling on his motion to re-open (docket #80). By failing to specify in writing that he wanted to appeal that ruling (and failing to obtain the government's consent and the court's approval), Wiggan waived his right to appeal that ruling. *See United States v. White*, 237 F.3d 170, 174 (2d Cir. 2001) (rejecting appeal on an issue that was not specifically reserved in conditional plea).

In any event, the district court properly exercised its discretion in declining to re-open the suppression hearing to allow Wiggan to introduce more evidence. With respect to Quintero's testimony, Wiggan argues that the court should have heard from Quintero because his proffered testimony might have bolstered the claim that Roman and Quintero entered the barbershop and immediately arrested Wiggan. Appellant's Br. at 31-32. This is inaccurate. In fact, the district court observed the following about Quintero's likely testimony:

> It is difficult to read much into the content of Quintero's transmission . . . Quintero's statement can also be interpreted more favorably for the government. . . . Understood that way, Quintero's statement does not imply that he entered Moe Love's barbershop believing he already had reasonable suspicion to seize Wiggan.

A276 n.5. Similarly, in denying the motion to reopen, the district court rejected the notion advanced by Wiggan here that notes containing triple hearsay of what Quintero may have said to another officer were sufficient to establish that his testimony would be helpful to Wiggan in any meaningful way. A323. This was not an abuse of discretion, particularly in the absence of any credible explanation for why Wiggan failed to call Quintero during the initial hearing.

With respect to Graham's testimony, Wiggan argues that it was an abuse of discretion for the district court to question whether her testimony would be helpful to the defense. In fact, in reviewing an affidavit completed by Graham, the district court correctly observed that her "testimony is at odds with the specific recollections of Blackwell and Turner, both of whom remembered Roman and Quintero approaching Wiggan in tandem and neither of whom recalled Wiggan being searched before being handcuffed. A324-25. The district court acknowledged that certain aspects of her testimony might support Blackwell's and Tucker's accounts, but, ultimately, concluded that her testimony would do nothing to alter the district court's findings. A325. This candid assessment of Graham's expected testimony was not an abuse of discretion.

Finally, Wiggan argues that it was an abuse of discretion to deny him an opportunity to retake the stand in order to testify about matters

that he had every opportunity to testify about during the initial hearing. According to Wiggan, the district court's consideration of his "credibility deficit" was improper. He provides no authority for that contention, however. Wiggan also suggests that the district court should have permitted him to re-take the stand because he had curtailed his initial testimony on the advice of counsel. Wiggan did not present any evidence that his decision to offer limited testimony during the suppression hearing was anything other than a strategic and reasonable decision to minimize his exposure on cross-examination and the risk of an adverse credibility finding. Under these circumstances, it was not an abuse of discretion for the district court to find that Wiggan's testimony would be inappropriate and unproductive. A325.

III. Wiggan was properly sentenced as an armed career criminal because his prior convictions for first-degree robbery, conspiracy to commit first-degree robbery and assault on a peace officer were violent felonies under 18 U.S.C. § 924(e).

A. Relevant facts

The central question at sentencing was whether Wiggan qualified as an Armed Career Criminal under 18 U.S.C. § 924(e). The Pre-Sentence Report ("PSR") found that Wiggan had previously sustained at least three convictions for offenses that qualified as "violent felonies" under 18 U.S.C. 924(e)(2)(B). PSR ¶11.

At sentencing, after considering the parties briefs and arguments on the issue, the district court determined, over Wiggan's objection, that Wiggan's two convictions for first-degree robbery, in violation of Conn. Gen. Stat. § 53a-134(a)(4) and one conviction for conspiracy to commit first-degree robbery, in violation of Conn. Gen. Stat. §§ 53a-134(a)(4) and 53a-48, categorically qualified as crimes of violence under § 924(e). A480-81, A483. In addition, the district court found that, under the modified categorical approach, Wiggan's conviction for Assault on a Peace Officer, in violation of Conn. Gen. Stat. § 53a-167c(1), constituted a violent felony. A482.

In determining that Wiggan's two convictions for first-degree robbery categorically qualified as "violent felonies," the district court reviewed the statutory elements of each offense, determined that they "categorically satisfy the definition of violent felony under ACCA," and concluded that Wiggan had necessarily admitted those elements as part of his guilty pleas. A481. In determining that Wiggan's conviction for conspiracy to commit first-degree robbery categorically qualified as a "violent felony," the district court reasoned that because Connecticut's conspiracy law required the commission of an overt act, the offense that Wiggan pleaded guilty to necessarily presented a "serious potential risk of physical injury to another." A483-84.

Next, the district court determined that Wiggan's conviction for Assault on a Peace Officer qualified as a violent felony. A482. After reviewing the charging document and the transcript of the plea colloquy, the district court noted that, during the plea colloquy, the prosecutor recited that Wiggan had punched a police officer in the face with a closed fist. When the judge then asked Wiggan whether the prosecutor's recitation was "substantially accurate," Wiggan stated, "yes, sir." Based on the its review of the relevant documents, the district court concluded that Wiggan was convicted under § 53a-167c(A)(1), which constituted a violent felony. A482.

Having determined that Wiggan qualified as an armed career criminal, the district court sentenced Wiggan to the mandatory minimum sentence of 180 months' imprisonment. A499.

B. Governing law and standard of review

A defendant is an Armed Career Criminal under 18 U.S.C. § 924(e) when he has at least three prior convictions that qualify as violent felonies. *Sykes v. United States*, 131 S. Ct. 2267, 2270 (2011). Section 924(e)(2)(B) defines the term "violent felony" as follows:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that–
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

To determine whether a prior conviction is a violent felony under 18 U.S.C. § 924(e), courts employ the categorical approach. "Under this

approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." *Sykes*, 131 S. Ct. at 2272 (internal quotation omitted); *see also Taylor v. United States*, 495 U.S. 575, 600-601 (1990).

Under § 924(e)(2)(B)(ii), when determining whether a prior conviction qualifies as a violent felony, courts consider whether the crimes are one of the enumerated crimes expressly listed or "whether the elements of the offense are of the type that would justify its inclusion within the residual provision [i.e., conduct that presents a serious potential risk of physical injury to another], without inquiring into the specific conduct of this particular offender." *James v. United States*, 550 U.S. 192, 202 (2007) (brackets added). "The matter of whether a crime other than one specifically identified as a violent felony in § 924(e)(2)(B)(ii) 'involves conduct that presents a serious potential risk of physical injury to another' is a question to be answered by reference to the general definition of the crime of which the defendant was convicted." *United States v. Andrello,* 9 F.3d 247, 249-250 (2d Cir. 1993) (internal quotation omitted).

C. Discussion

1. Wiggan's two convictions for first-degree robbery qualified as violent felonies.

Wiggan's two prior convictions for first-degree robbery, in violation of Conn. Gen. Stat. § 53a-134(a)(4), are violent felonies under § 924(e). The crime of first-degree robbery, which refers to, and includes, the predicate crime of robbery, under Conn. Gen. Stat. § 53a-133, is a class B felony and has as an element the use, attempted use, or threatened use of physical force against the person of another. *See* Conn. Gen. Stat. § 53a-133 ("A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of [taking property]."). Because this crime has an element of the use or threatened use of force, it categorically qualifies as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i).

Indeed, this Court has held unequivocally that the crime of robbery is a crime of violence under 18 U.S.C. § 924(e)(2)(B)(i). *See United States v. Brown*, 52 F.3d 415, 425 (2d Cir. 1995); *see also United States v. Houman*, 234 F.3d 825 (2d Cir. 2000) (holding that robbery is a crime of violence under § 4B1.2); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (same); *United States v. White*, 571 F.3d 365, 370-73 (4th Cir. 2009); *United States v. Brown*, 437 F.3d 450,

452 (5th Cir. 2006) (same); *United States v. Melton*, 344 F.3d 1021, 1025-26 (9th Cir. 2003) (same); and *United States v. Presley*, 52 F.3d 64, 69 (4th Cir. 1995) (same).

Wiggan seeks to circumvent this Court's view that robbery is a violent felony by noting that this Court's rulings to that effect considered New York's robbery statute. Wiggan is correct that *Brown* and *Spencer* involved an analysis of New York's generic robbery statute, which defines robbery as "forcibly steal[ing] property and . . . us[ing] or threaten[ing] the immediate use of physical force upon another person." *See Spencer*, 955 F.2d at 820. Wiggan fails to note, however, that Connecticut's generic robbery statute, which is encompassed by the first-degree robbery statute, contains identical language to the New York statute. *See* Conn. Gen. Stat. § 53a-133.

Wiggan argues that Connecticut's first-degree robbery statute is divisible because it prohibits conduct not covered by the common law definition of robbery, and is, therefore, subject to analysis under the modified categorical approach. Wiggan cites *United States v. Walker*, 595 F.3d 441 (2d Cir. 2010), for the proposition that the first step in determining whether an offense is subject to categorical analysis is to examine whether the offense prohibits conduct beyond the common law definition of the crime. In *Walker*, this Court addressed the issue of whether certain state common law offenses qualified as

crimes of violence under U.S.S.G. § 4B1.2. Because § 4B1.2 enumerated only generic offenses, this Court noted that a sentencing court must consider whether the state's common law definition corresponded with the generic definition of the offense listed under U.S.S.G. § 4B1.2. *See Walker*, 595 F.3d at 445-46.

In this case, *Walker* is inapposite because first-degree robbery in Connecticut is a clearly defined statutory offense, requiring proof that an individual "uses or threatens the immediate use of physical force upon another person." Conn. Gen. Stat. 53a-133. There is, thus, no need to look to the common law definition of robbery because the elements of the statutory offense facially render first degree robbery under Connecticut law to be a violent felony under 18 U.S.C. § 924(e). Moreover, in this case, Wiggan sustained both of his first-degree robbery convictions under Conn. Gen. Stat. § 53a-135(a)(4). Therefore, in addition to having "use[d] or threaten[ed] the immediate use of physical force upon another person," Wiggan necessarily display[ed] or threaten[ed] the use of what he represent[ed] by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun." Conn. Gen. Stat. § 53a-135(a)(4). In this particular case, then, even if the elements of Connecticut's robbery statute did not mirror the language of § 924(e)(2)(B)(i), Wiggan's commission of this particular type of first-degree robbery necessari-

ly "present[ed] a serious potential risk of physical injury to another," under the residual clause of § 924(e)(2)(B)(ii).

2. Wiggan's conviction for conspiracy to commit first-degree robbery qualified as a violent felony.

A conviction for conspiracy to commit first-degree robbery qualified as a violent felony under the residual clause of § 924(e)(2)(B)(ii) because, as the district court found, one cannot commit that offense without engaging in conduct that conduct that "presents a serious potential risk of physical injury to another." A483. Under Connecticut law, in order for a person to be guilty of conspiracy to commit first-degree robbery, one must intend to commit first-degree robbery, agree with another person to do so, and a co-conspirator must then commit an overt act in furtherance of the conspiracy. *See* Conn. Gen. Stat. §§ 53a-48 and 53a-134(a)(4). Further, in this case, because Wiggan was charged with conspiring to violate a specific sub-section of the first-degree robbery statute, he necessarily conspired to commit robbery with intent to "use[] or threaten[] the immediate use of physical force upon another person," while "display[ing] or threaten[ing] the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." Conn. Gen. Stat. §§ 53a-134(a)(4). Then, a member of the conspiracy must commit an overt act in pur-

suance of the conspiracy. In analyzing these elements, the district court properly found that, categorically, one cannot agree to "use[] or threaten[] the immediate use of physical force upon another person" and to 'display[]] or threaten[] the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm," then take an overt act to accomplish those objectives without "present[ing] a serious potential risk of physical injury to another." A483. *Cf. United States v. Desena*, 287 F.3d 170, 181 (2d Cir. 2002) (conspiracy to commit first-degree robbery is a crime of violence under 18 U.S.C. § 924(c) because when a conspiracy exists to commit a crime of violence, such as kidnapping, the conspiracy itself poses a 'substantial risk' of violence).

Wiggan principally cites two cases from the Tenth Circuit, suggesting that an agreement to commit a violent act in a particularly violent way and an overt act toward that violence, is not necessarily a "violent felony." First, Wiggan cites *United States v. King*, 979 F.2d 801 (10th Cir. 1992). In *King*, the Tenth Circuit's conclusion that a conspiracy to commit robbery was not categorically a violent felony turned on the fact that an overt act was not an element of conspiracy under New Mexico law. *Id.* at 803 (emphasizing that "the crime of conspiracy in New Mexico is complete upon the formation of the intent to

commit a felony, and does not require that any action be taken on that intent"). In *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007), the Tenth Circuit considered whether a conspiracy to commit burglary in the second degree, under Colorado law, qualified categorically as a violent felony. The Court noted that although Colorado law required that an overt act be committed in furtherance of the burglary conspiracy, there was no requirement that the overt act be directed toward entering the building that was the subject of the burglary. *Id*. at 1044. Therefore, according to the Court, the overt act requirement did not necessarily increase the risk of physical confrontation. *Id*.

These cases are neither controlling, nor persuasive. First, the absence of an overt act requirement under New Mexico law was the overriding consideration in *King*. In Connecticut, an overt act is required, an element that significantly elevates the risk presented by the conspiracy.

Second, in *Fell*, the Tenth Circuit considered an offense—conspiracy to commit burglary in the second degree—that has as its primary object the entrance into a building. The Court attempted to assess the risk of danger to another individual from the mere agreement enter a building with intent to commit a crime therein and concluded that such an agreement does not categorically constitute a crime of violence. The conspiracy of which Wiggan stood convicted, by con-

trast, was not a conspiracy to commit second-degree burglary. Rather, Wiggan was convicted of agreeing to "use[] or threaten[] the immediate use of physical force upon *another person*," while "display[ing] or threaten[ing] the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm," and an overt act was committed to bring about those objectives. Conn. Gen. Stat. §§ 53a-134(a)(4), 53a-48. In contrast to *Fell*, a violation of the statute at issue here presents a much more immediate risk of danger to an actual person, and this Court's precedents and the weight of authority supports such a view. *See United States v. Begay*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment) ("For some crimes, the severity of the risk will be obvious. Crimes like . . . conspiracy to commit a violent crime . . . certainly pose a more serious risk of physical injury to others than burglary.") (internal citations omitted)); *Desena*, 287 F.3d at 181; *United States v. Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) (conspiracy to commit armed robbery is a crime of violence under the Bail Reform Act, in part, because "a conspiracy to commit an act of violence is an act involving a 'substantial risk' of violence"); *United States v. Gore,* 636 F.3d 728 (5th Cir. 2011) ("An agreement to commit aggravated robbery presents a serious potential risk of injury . . . [the agreement] is an aggressive act. It contemplates aggression toward another"); *United States v. Greer*, 939 F.2d

1076, 1099, (5th Cir. 1991), *aff'd in pertinent part*, 968 F.2d 433, 438 (5th Cir. 1992) (en banc) ("conspiring to deprive citizens of their civil rights . . . is a crime of violence within the meaning of section 924(c), because it creates 'a substantial risk' of violence.").

3. Wiggan's conviction for assault on a peace officer qualified as a violent felony.

Wiggan's conviction for assault on a peace officer under Conn. Gen. Stat. § 53a-167c qualified as a "violent felony" because the uncontested facts recited by the prosecutor established that Wiggan was convicted under a sub-section of the statute, *i.e.*, § 53a-167c(a)(1), that categorically "presents a serious potential risk of physical injury to another." *See United States v. Brown*, 629 F.3d 290, 295-96 (2d Cir. 2011) (per curiam) (a violation of Conn. Gen. Stat. § 53a-167c(a)(1) qualifies as a "violent felony" because the statute "typically involve[s] purposeful, violent, and aggressive conduct" and "requires that the victim suffer physical injury"). In particular, the district court reviewed the prosecutor's factual recitation that Wiggan was apprehended by the police following a foot pursuit and, during that apprehension, "turned and punched Officer Hoffman in the face with a closed fist." A403, A482. Given these facts, the district court concluded that the only sub-section of Conn. Gen. Stat. § 53a-167c covering such conduct is subsection 53a-

167c(a)(1), which, under *Brown*, categorically sets forth a "violent felony" offense. A482. The other sub-sections of the statute, which the district court acknowledged was "arguably divisble," prohibits the "throw[ing] or hurl[ing]" of a foreign substance or object, *see* § 53a-167c(2), (4)-(5), or the use of a "deleterious agent." *See* § 53a-167c(3); A482. Because the conduct recited by the prosecutor would not have constituted a violation of any provision of the statute other than sub-section § 53a-167c(a)(1), Wiggan's conviction necessarily qualified as a violent felony.

Moreover, Wiggan's admission that the facts recited by the prosecutor were "substantially accurate," when combined with the court's statutory analysis, was sufficient to establish that the preponderance of the evidence demonstrated that Wiggan's conviction necessarily rested on predicate conduct. Indeed, if Wiggan had engaged in conduct covered by one of the other subsections of the statute, the prosecutor's recitation of facts would have been an entirely inaccurate and an insufficient basis for the plea.

Wiggan argues that *Brown* is not controlling in this case because the conduct in *Brown* involved an assault on a corrections officer, not a police officer. Other than highlighting the fact that corrections officers are particularly vulnerable to inmate violence, Wiggan provides no explanation for why a police officer would not suffer the same type of harm when an assailant at-

tacks him in the manner prescribed by § 53a-167c(a)(1).

Wiggan's principal argument, however, is that his admission that the facts recited by the prosecutor were "substantially accurate," is insufficient to establish that he pleaded guilty to Conn. Gen. Stat. § 53a-167c(a)(1). Wiggan ignores the fact that, regardless of his admission, the prosecutor's recitation was consistent only with a violation of § 53a-167c(1). Therefore, "the plea 'necessarily' rested on the fact identifying the conviction as a predicate offense." *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008)). Moreover, Wiggan admitted during a plea colloquy that the prosecutor's recitation was "substantially accurate," where the only fact recited by the prosecutor that brought his offense within the statute of conviction was that he "punched Officer Hoffman in the face with a closed fist." A403. Having entered a non-*Alford* plea to this offense, Wiggan necessarily acknowledged the factual basis for the plea as recited by the prosecutor.

* * *

In sum, because Wiggan had at least three qualifying violent felonies, the district court properly sentenced him as an Armed Career Criminal.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,997 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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