Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

TIMMY WALLACE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

JONATHAN I. EDELSTEIN
EDELSTEIN & GROSSMAN
501 Fifth Avenue, Suite 514
New York, NY 10017
Tel.: (212) 871-0571
Fax: (212) 922-2906
Email: jonathan.edelstein.2@gmail.com

Counsel of Record

STATEMENT OF QUESTIONS PRESENTED

1. Does Rodriguez v. United States, 135 S. Ct. 1609 (2015) permit a traffic stop to be extended based on a suspicion that had already been dispelled by police database checks and searches?

2. Is the theoretical possibility of a "VIN swap" a valid basis to extend a traffic stop in the absence of evidence that the VIN has in fact been tampered with, and is examination of a non-public VIN an extension of a traffic stop where the public VIN is visible and intact, see United States v. Caro, 248 F.3d 1240, 1246 (10th Cir. 2001)?

3. May officers extend a traffic stop by claiming ignorance of a database search that the record shows was run by one of the officers on the scene?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Timmy Wallace.

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United States v. Wallace,
Order Dated Nov. 19, 2019 (2d Cir.) (unpublished)

The decision of the Court of Appeals was an affirmance of the conviction and sentence imposed by the United States District Court for the Southern District of New York (Hon. Katherine B. Forrest, J.), entered February 13, 2017, upon a jury verdict adjudging Petitioner guilty of one count of being a felon in possession of a firearm.

The unpublished order dated November 19, 2019 denied petitioner's petition for rehearing *en banc*.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit in a criminal case. The instant petition is timely because the Second Circuit's order denying rehearing *en banc* was entered on November 19, 2019. There have been no orders extending the time to petition for *certiorari* in the instant matter.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 4

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.

STATEMENT OF FACTS

On May 25, 2015, at 7:20 p.m., NYPD Officer Harris Haskovic stopped petitioner Wallace's vehicle in the Bronx based on an observation of a defective brake light. (A153-57).[1] With Officer Haskovic in his patrol vehicle were Officer Michael Monahan and Sergeant Davon Alston. (A152). Officer Alejandro Azcona, who saw the stop as it occurred, also pulled over immediately and was told to stand by. (A315-16, 320).

At the time of the stop, Mr. Wallace was driving the car and there were two passengers who he said he knew. (A154-55). There was a Papa John's Pizza sign on top of the car and a pizza delivery bag on the seat. (A197-98, 202). Mr. Wallace produced a valid license. (A203). He cooperated and didn't attempt to flee. (A203).

Upon visual inspection by Officer Haskovic, the registration card and inspection sticker on the car windshield were faded. (A162). 12 of the 17 digits of the VIN number were legible on the registration sticker. (A163, 207). However, Officer Haskovic was able to view the complete public VIN number at the bottom of the windshield on the dashboard (A165, 207, 210), which was consistent with the legible numbers on the registration sticker (A210). The license plate was also consistent with the registration sticker. (A206-07, 212). Moreover, Officer Haskovic acknowledged that the inspection sticker was valid and that there was nothing illegal about the way it was taped on the windshield. (A204).

Officer Haskovic further testified that he noticed "tool marks" on the driver's

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[1] Citations to "A." refer to the Appellant's Appendix filed with the Second Circuit, a copy of which will be provided to this Court upon request.

side door (A161), which Mr. Wallace explained by stating that he had locked himself out at one point (A165, 202). The car was in a generally poor and beat-up condition with scratches and dents all over. (A199-200).

In the meantime, Officer Azcona provided Officer Haskovic with a Rugby device. (A316, 321). The Rugby device is a portable electronic device that allows officers to search law enforcement databases and programs, and is capable of running licenses, vehicle types, plate numbers, VINs, names, and anything searchable within the NYPD. (A322). If someone's name were put into the Rugby, it would be possible to learn if that person had any outstanding summonses or warrants, what car if any was registered to that person's name, and the plate and VIN of that car. (A322). It was also possible to run a license plate number and discover the VIN associated with that plate. (A322-23).

A Rugby search regarding Mr. Wallace and his vehicle was done at 7:22 p.m. (A367) at an outside location, "definitely not in the precinct" (A369-70). It was an ESP search, i.e., a comprehensive search of every NYPD database. (A370, 375). It also included a search through the DMV. (A373). The search was done using Mr. Wallace's name. (A372, 376). This report included the license plate and registration of Mr. Wallace's car, the VIN number and make of the vehicle, Mr. Wallace's date of birth and address, and whether the car had been reported stolen. (A377-81).

It was the practice for the officer who ran a Rugby search to review the important details of the results. (A441). This would include the name and date of birth of the subject of the Rugby search as well as his address, license, registration and

VIN number and whether the car had come up stolen. (A442). Thus, Sergeant Alston admitted that as of 7:22 p.m., there was no indication that the car was stolen. (A442-43).

Likewise, Sergeant Chan, a member of the NYPD audit department who had formerly fixed computers in the information technology department and had a computer information systems degree (A356-57), testified:

> Q. So based on looking at this report, *which was run at 7:22 p.m.*, the officer would have known that this particular vehicle was registered to Mr. Wallace, correct?
>
> *A. That's correct.*

(A378) (emphasis added).

Nevertheless, the officers did not let Mr. Wallace go at that time, and seven minutes later, at 7:29 p.m. (A231, 234), Officer Haskovic asked Mr. Wallace if he could open the driver's side door to display the federal VIN label (A166). The reason Officer Haskovic wanted to "cross-reference" the VIN was that he believed the car had signs of a stolen vehicle. (A166). These consisted of tool marks, not having the registration card, and the condition of the registration and inspection sticker. (A166-67).

According to Officer Haskovic, defendant consented and allowed him to open the door. (A166). Upon opening the door, Officer Haskovic did not see the federal sticker. (A167). He then arrested Mr. Wallace for violating Section 170.70 of the New York Penal Law (A169), and during a subsequent inventory search at the police precinct, a gun was found in a grocery bag under the hood (A182-83), leading to the instant federal felon-in-possession prosecution.

On November 12, 2015, Mr. Wallace was charged by information with one count of being a felon in possession of a firearm and ammunition pursuant to 18 U.S.C. § 922(g)(1) and (2). (A33). At that time, petitioner waived indictment and consented to prosecution by information. (A35). Subsequently, however, a one-count indictment was lodged against petitioner charging the same offense. (A119-20).

In the district court, petitioner sought suppression of the subject weapon and argued specifically that as of 7:22 p.m., there was no remaining cause to hold the vehicle. (A511-12, 523). The district court denied suppression in a written decision which did not, however, touch upon whether the continued detention of Mr. Wallace and his vehicle after 7:22 p.m. was lawful (App. 44-75).[2] The district court did, however, find as fact that a Rugby search was done by "one of the officers at the scene" at 7:22 p.m. and that "[t]he information returned provided verification of defendant's driver's license information, vehicle type, and license plate [as well as] a VIN number that matched the full public VIN on the dashboard of defendant's car and the partial VIN visible on the registration sticker." (App. 54-55). The court stated that, according to Officer Haskovic, this did not necessarily alleviate concerns about a "VIN swap." (App. 56). Notably, however, there was no testimony at the hearing that indicated even remotely that the public VIN had been damaged or looked like it might have been "swapped," and indeed, there was admittedly no evidence of tampering with the dashboard VIN. (A165, 207, 210, 294).

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[2] Citations to "App." refer to the appendix to this Petition.

Mr. Wallace proceeded to trial on September 12 and 13, 2016, resulting in conviction.[3] On February 10, 2017, the district court sentenced him to 180 months in prison pursuant to the Armed Career Criminal Act ("ACCA"), and judgment reflecting the verdict and sentence was entered on February 13, 2017. (A650, SA33-39).[4]

Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Second Circuit. (A657). On appeal, petitioner argued that the continued detention of his vehicle after 7:22 p.m. was unlawful under this Court's decision in Rodriguez v. United States, 135 S. Ct. 1609 (2015).

On September 3, 2019, a panel of the Second Circuit (Winter and Pooler, C.JJ., and Abrams, D.J.), decided the appeal. (App. 1-43). By a vote of 2-1, the panel affirmed the conviction and sentence. The majority opinion was written by Judge Abrams, with Judge Winters concurring (App. 1-25); Judge Pooler wrote an opinion concurring as to the an ACCA issue also raised by petitioner but dissenting on the suppression of the weapon (App. 26-43).[5]

In pertinent part, the majority opined that under Rodriguez, supra, "a traffic stop may be extended beyond the point of completing its mission if an officer develops a reasonable suspicion of criminal activity." (App. 13). Without determining whether

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[3] Neither the Second Circuit appeal nor this Petition challenges any aspect of the trial, and therefore, it is unnecessary to discuss the trial evidence in detail.

[4] Citations to "SA" refer to the special appendix filed with the Second Circuit, a copy of which will be provided upon request.

[5] It is noted that the circuit judges sitting on the panel, as opposed to district judges sitting by designation, split 1-1.

the Rugby report "resolved any ordinary inquiries incident to the traffic stop," the majority held that it did not "conclusively dispel[] any reasonable suspicion that the car was stolen." (App. 14).

The majority stated that absent the Rugby search, the officers would have had reasonable suspicion to detain the vehicle based on (a) the scratch marks; (b) Mr. Wallace's inability to produce the registration card; (c) the damage to the registration and inspection stickers; and (d) defendant's statement that the damage had been caused by a defogging spray. (App. 14-16). The majority further found that the Rugby search did not conclusively dispel the suspicion because "Haskovic testified at the suppression hearing that a Rugby report which indicates that a visible VIN on a stopped vehicle is the same VIN that is registered to the driver does not necessarily provide conclusive proof that the vehicle is, in fact, not stolen," because "in the case of a VIN swap, a Rugby report could fail to identify a stolen vehicle." (App. 16).

The majority opined that there were numerous factors "suggesting that Wallace's vehicle not only may have been stolen, but more specifically, that it may have been subjected to a VIN swap" (App. 17), but notably, the "factors" enumerated by the majority were the same ones previously identified as constituting the "pre-Rugby" basis of suspicion, and nothing more, (App. 18). It was the majority's opinion that the water-damaged VIN sticker was enough to create a suspicion of a VIN swap even without damage to the public VIN on the dashboard. (App. 18-19).

Thus, the majority concluded that "the officers reasonably formed the suspicion, despite the Rugby report, that criminal activity may have been afoot." (App. 18). The

majority concluded further that the extension of the stop was "limited and narrowly tailored to [the officers'] reasonably-formed suspicions." (App. 19).

Judge Pooler, in dissent, argued powerfully that the Rugby search did indeed dispel any suspicion that the vehicle had been stolen. (App. 26-43) (Pooler, J., dissenting). She began her analysis as follows:

> This case presents a simple question: did the Rugby report dispel the officers' reasonable suspicion that the vehicle was stolen? The majority responds that it did not. It relies solely upon its view of Officer Haskovic's testimony - "that in the event of a VIN swap, a Rugby report might fail to detect that a vehicle is stolen" - to reason in a circular fashion that the Rugby report did not dispel the officers' reasonable suspicion because of the officers' reasonable suspicion. I cannot agree.

(App. 26-27).

Judge Pooler noted in particular that the following facts were undisputed at the suppression hearing: (a) that the public VIN on the dashboard matched the legible digits of the VIN printed on the registration sticker; and (b) the VIN in the Rugby report matched the full VIN on the dashboard plate and confirmed that the vehicle was registered to Mr. Wallace. (App. 28). "Under these circumstances, it is of no moment that the public VIN was cross-checked against the Rugby report rather than the registration sticker," because "a VIN swap requires *physical* movement of the VIN plate from one vehicle to another" which "bears signs." (App. 29) (emphasis added) (collecting cases). Thus, "where an untampered-with dashboard VIN plate checked out against a comprehensive records check, it was virtually impossible for the vehicle nonetheless to have been stolen or VIN-swapped." (App. 30).

The virtual impossibility of a VIN swap compelled the conclusion that the continued detention of Mr. Wallace's vehicle after 7:22 p.m. was unlawful, because "the only way the officers could have suspected the vehicle may have been stolen [after the Rugby report] was if a VIN swap had occurred." (App. 30-31). Te other factors cited by the majority were "the very facts underlying the initial reasonable suspicion that the Rugby search dispelled." (App. 31). Indeed, as Judge Pooler pointed out, "the unvarying chorus throughout the majority opinion echoes these suspicious facts viewed *absent* the results of the Rugby report... [but] does not, however, grapple with the *presence* of the Rugby report." (App. 31) (emphasis added).

Judge Pooler then pointed out particular ways in which the Rugby report was not accounted for by the majority. Citing United States v. Caro, 248 F.3d 1240, 1246 (10th Cir. 2001), Judge Pooler reasoned that a valid dashboard VIN was not a reason to continue inspecting the vehicle, and that according to the admissions of both Sergeant Chan and Sergeant Alston, the Rugby report confirmed that the vehicle was lawfully registered to Mr. Wallace. (App. 31-32). Moreover, while certain circumstances, such as tampering with the public VIN or a Rugby check revealing that the VIN is not on file, might justify a suspicion of a VIN swap, Officer Haskovic's training regarding the possibility of VIN swaps (which he had never actually seen an example of) did not justify such suspicion in the absence of any evidence that the public VIN had been tampered with. (App. 32-35). Moreover, none of the officers testified that the results of the Rugby search were suspicions, and "it is difficult to fathom how a comprehensive records check confirming an undamaged full dashboard VIN plate

could be less 'effective' than proceeding inside the vehicle to examine one of a possible 18 non-public VINs." (App. 35).

Finally, Judge Pooler stated that the "numerous other factors" cited by the majority as indicating a possible VIN stop were "the very factors that gave rise to suspicion that the Rugby search dispelled," and none of these factors had anything to do with the VIN or suggested that the VIN had been swapped. (App. 36-37).

Judge Pooler then went on to discuss a factor not decided by the majority: whether examining the internal VIN was an ordinary inquiry incident to the traffic stop. (App. 38-43). She opined that although examining the dashboard VIN and checking it against police records was an ordinary part of the traffic stop, the officers were not permitted to prolong the stop in the absence of any indication that the plate had been tampered with. (App. 38-40). Thus, "[t]he seven minutes the officers prolonged the stop was unconstitutional," resulting in "a defective brake light cost[ing Mr. Wallace] fifteen years of his life." (App. 40).

Mr. Wallace timely sought rehearing *en banc*, which was denied by order entered November 19, 2019. (App. 76).

REASONS FOR GRANTING THE WRIT

THE TRAFFIC STOP WAS UNLAWFULLY PROLONGED BASED ON A PURPORTED SUSPICION THAT AMOUNTED TO A MERE HUNCH AND HAD ADMITTEDLY ALREADY BEEN DISPELLED

1. Traffic stops are among the most common interactions between citizens and the police, and the boundary between permissible and impermissible vehicle stops

is one of the most common subjects of this Court's Fourth Amendment jurisprudence. Moreover, in the traffic-stop context as in other Fourth Amendment situations, it is necessary to determine how new technological developments affect the permissible bounds of law enforcement conduct.

This case implicates the increasing availability of computerized databases to law enforcement officers in the field. More and more police officers throughout the country have access to devices similar to the Rugby device used by the NYPD, which can determine the status of a vehicle within seconds without the necessity of calling in a query to the precinct. Thus, what this Court described in Rodriguez v. United States, 135 S. Ct. 1609 (2015) as the ordinary incidents of a motor vehicle stop are now often completed within a couple of minutes of the time the vehicle is first detained.

The question at bar in this case – the Fourth Amendment consequences of a database search that comes up clean and, by the admission of the commanding officer at the scene, dispels any suspicion that a vehicle is stolen – is thus one that will increasingly recur throughout the nation. Moreover, issues ancillary to this question will also recur – whether a stop can be extended based on a theoretical possibility of VIN tampering without evidence thereof, and whether examination of a non-public VIN represents an extension of a traffic stop where the public VIN is visible and intact – and the fact that the Second Circuit in this case resolved those issues in a manner contrary to the Tenth Circuit's decision in United States v. Caro, 248 F.3d 1240, 1246 (10th Cir. 2001), renders them, as well, both ripe for and worthy of this Court's review.

2. In Rodriguez, supra, this Court considered and rejected the proposition

that "de minimis" additional detention after the completion of a car stop was within constitutional bounds. The defendant in Rodriguez was stopped on the highway by a Nebraska police officer, who checked his license, ran a records check, and issued a warning for driving on the shoulder. See Rodriguez, 135 S. Ct. at 1612-13. The officer then asked Rodriguez for permission to walk his dog around the vehicle, and after Rodriguez refused, he detained Rodriguez and the vehicle until a drug dog could arrive. Id. at 1613. Drugs were found and Rodriguez was indicted. Id.

A district court denied suppression of the drug on the ground that the detention after the completion of the car stop, which lasted "seven to eight minutes," was "only a *de minimis* intrusion on Rodriguez' Fourth Amendment rights and was therefore permissible." Id. at 1613-14. The Eighth Circuit affirmed, id. at 1614, but this Court granted certiorari and reversed.

This Court began by restating the settled position that a traffic stop is "analogous to a so-called Terry stop." Id., citing Knowles v. Iowa, 525 U.S. 113, 117 (1998) and Terry v. Ohio, 392 U.S. 1 (1968). Thus, "[l]ike a Terry stop, he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' - to address the traffic violation that warranted the stop and attend to related safety concerns." Id. (citations omitted). "Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose." Id., quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005).

Thus, while an officer may conduct "unrelated inquiries" during the period before a traffic stop is completed, "[t]he seizure remains lawful only so long as [such]

inquiries do not measurably extend the duration of the stop." Rodriguez, 135 S. Ct. at 1615. In other words, an officer who is engaged in inquiries unrelated to the purpose of the traffic stop "may not [conduct them] in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." Id.

The Rodriguez Court next considered what the purposes of a traffic stop were. These included "determining whether to issue a traffic ticket" and "ordinary inquiries incident to [the] stop." Id., quoting Caballes, supra. "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Id. But while it is permissible to prolong a car stop for these inquiries, it is not permissible to extend the stop to take "measure[s] aimed at detecting evidence of ordinary criminal wrongdoing." Id.

Finally, this Court held that even minimal detention beyond the point when the mission of the stop is completed must be justified by independent reasonable suspicion. See id. at 1615-16. It noted that "an officer an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely," such as checking for outstanding warrants, but that "[o]n-scene investigation into other crimes... detours from that mission." Id. at 1616. The Court also rejected the argument that an officer might "earn bonus time" to pursue a criminal investigation by conducting the traffic stop expeditiously. Id. Moreover, and significantly, the Court stated that "[t]he critical question... *is not whether the [criminal investigation] occurs before or after the officer issues a ticket...* but whether [it] prolongs - i.e., adds time to

- the stop." Id. (emphasis added).

3. This case presents the interface between this Court's rejection of "de minimis" traffic stop extensions in Rodriguez and the emerging technology that enables the ordinary incidents of a stop to be completed within minutes. Here, two minutes after Mr. Wallace's vehicle was stopped, the Rugby search confirmed that he had a valid license and no warrants, and also confirmed that his vehicle was properly registered, properly insured, and not stolen. Thus, the "mission" of the stop, as defined by Rodriguez, was completed – and under the Rodriguez holding, not even a minimal extension of the intrusion was permitted. Nevertheless, the Second Circuit held that it *was* permissible for the officers at the scene to poke around Mr. Wallace's vehicle for seven more minutes – and as Judge Pooler ably pointed out, they did so by pretending that the Rugby search did not exist.

As discussed above, the majority cited two factors in upholding the prolongation of the stop: the possibility of a VIN swap, and the tool marks on the vehicle door. *Prior to* the Rugby search, these factors might arguably have given rise to a valid suspicion of theft. But once the Rugby search was done, the dashboard VIN checked out, and so did Mr. Wallace's ownership of the vehicle. Both Sergeant Alston, the commanding officer at the scene, and Sergeant Chan, the police information technology expert, *admitted* that as of 7:22 p.m. when the Rugby search was done, the officers *knew* the vehicle was not stolen. The officers *knew* that notwithstanding any tool marks and/or water damage to the VIN sticker, the vehicle was properly registered to Mr. Wallace and there was no evidence of circumstances such as a recent re-registration that might

cast the Rugby results in doubt. Hence, the Rugby search precluded any possibility that either the tool marks or the damaged VIN sticker were the result of forced entry or were otherwise the result of theft.

This Court's holding in Rodriguez – a holding predicated upon motorists' fundamental right to privacy and their right to be free of unreasonable searches and seizures – cannot be circumvented so easily. If the police may continue to detain a vehicle based on factors that have already been dispelled by a search of their own database, then the limitation set forth by Rodriguez will effectively cease to exist. Law enforcement officers would be able to continue to detain vehicles and rummage around for evidence of unrelated criminal activity even after all the questions that constitute the mission of the traffic stop have been answered, as long as they can point to some suspicion that existed *before* they learned the answers to those questions. Given that the availability of Rugby-type technology means that this issue will arise more and more often, this Court should step in now to prevent such circumventions of Rodriguez to be enshrined in law. See Rodriguez, 135 S. Ct. at 1615-16; see also United States v. Gomez, 877 F.3d 76, 89-90 (2d Cir. 2017).

4. The Second Circuit's decision that a suspicion of a "VIN swap" remained after the Rugby search is also predicated upon a mistaken idea about how VIN swaps are in fact done. As a threshold matter, Justice Pooler was correct in noting that this Court's decision in New York v. Class, 475 U.S. 106 (1986), which held that inspection of a *public* VIN is part of the ordinary incidents of a traffic stop, does not permit inspection of *non-public* VINs where, as here, the public VIN is visible and intact. To

the contrary, further penetration into the vehicle to examine other VINs is outside the bounds of a traffic stop and may only be undertaken if there is evidence that the public VIN has been tampered with. See United States v. Caro, 248 F.3d 1240, 1246 (10th Cir. 2001). Thus, prolongation of the traffic stop in this case for the purpose of inspecting the doorjamb VIN could only be based on a reasonable suspicion of VIN tampering.

The majority's opinion is based on the assumption that a partially illegible VIN *sticker*, a missing registration card, and/or the defendant's statement that the damage to the sticker had been caused by defogging spray, can establish reasonable suspicion of a VIN swap, and that evidence of tampering with the public VIN is thus not necessary. But that is not how VIN swaps work. A VIN swap involves the physical removal of the public dashboard VIN plate and its replacement with a VIN plate from another vehicle. See, e.g., People v. Epperson, 168 Cal. App. 3d 856, 859 (Cal. App. 1985) (describing how VIN swaps are done and noting that they involve "the VIN number from the 'salvage' car [being] affixed in the dashboard"); People v. Joiner, 84 Cal. App. 4th 946, 954 (Cal. App. 2000) (explaining that a VIN "switch" or swap occurs where a dashboard "VIN plate is removed from the dash of a junked vehicle and placed on a stolen vehicle"). A damaged sticker, in the absence of any indication of tampering with the dashboard VIN plate, simply does not indicate the possibility of a VIN swap, and therefore, a damaged sticker, or even a defendant's allegedly-less-than-credible explanation of how the sticker was damaged, cannot be bootstrapped into reasonable suspicion that a VIN swap has occurred.

Moreover, the Second Circuit majority opinion in this matter is in direct conflict with the precedential rulings of the Tenth Circuit, which have held that in the absence of evidence that the public VIN plate has been tampered with, an officer's training concerning the fact that VIN swaps sometimes happen does not create a reasonable suspicion to believe that a swap has occurred in the subject vehicle:

> ... [T]he fact that dashboard VIN plates can be altered tells us nothing. Door VIN plates can be altered. All VIN plates can be altered... The government's mere conjectures as to the likelihood of any particular VIN having been modified are therefore insufficient to overcome Class and Miller's specific bar to the course of conduct pursued here by Trooper Avery.
>
> *The government's reading of Class would transform the valid dashboard VIN, which would at least suggest that Mr. Caro's car was not stolen, into a legal reason to penetrate further into the vehicle.* We decline to extend Class in this manner. Instead, consonant with both Class and Miller, we affirm that *where the dashboard VIN plate is readable from outside the passenger compartment, that VIN matches the VIN listed on the registration, and there are no signs the plate has been tampered with, there is insufficient cause for an officer to extend the scope of a detention by entering a vehicle's passenger compartment for the purpose of further examining any VIN.*

Caro, 248 F.3d at 1246 (emphasis added); accord United States v. Chavira, 2005 WL 1213670, *4 (D. Kan. 2005), aff'd, 457 F.3d 1288 (10th Cir. 2006) ("Trooper Phillips impermissibly extended the scope of Chavira's detention by entering his truck to check a secondary VIN against the VIN listed on the registration. The VIN on the dashboard matched the VIN on the registration, and Trooper Phillips did not indicate that the VIN on the dashboard appeared tampered with").

Here, as in Caro, there were no physical signs of tampering with the public VIN, and therefore, no sign of a VIN swap. Moreover, Officer Haskovic's "training and experience" is not a mantra that can establish a suspicion of VIN tampering where none exists. The courts do not "merely defer to the police officer's judgment" in determinign the existence of reasonable suspicion, United States v. Freeman, 735 F.3d 92, 96 (2d Cir. 2013), and Officer Haskovic's training that VIN swaps *can* occur does not, in the absence of physical signs that such a swap *did* occur, elevate his conjecture beyond the level of a mere hunch, see generally United States v. Sokolow, 490 U.S. 1, 7 (1989).

Petitioner notes that, as with the threshold issue of whether a traffic stop may be prolonged after a police database search answers all the questions comprising the mission of the stop, the issue of permissible VIN searches will recur. In addition to the differing conclusions reached by the Second and Tenth Circuits, the fact remains that damage to VIN stickers due to weathering, liquid spills, accident, careless installation, or other means happens all the time. The sticker is not the public VIN, and if the Second Circuit's opinion in this case is allowed to stand, then every time officers observe a damaged registration *sticker*, they will be able to extend their stop and penetrate into non-public areas of a vehicle based on the the mere existence of VIN swaps, even in the absence of any evidence that the public VIN has in fact been swapped. This, again, will not only impermissibly extend the rationale of Class to places that rationale was never intended to go, but will render Rodriguez nugatory in any case where the registration sticker is no longer pristine. Thus, this Court should

join the Tenth Circuit in "declin[ing] to extend Class" in the manner that the Second Circuit majority did in this case, see Caro, 248 F.3d at 1246, and should grant certiorari to clarify that Class does not permit a vehicle stop to be extended based on suspicion of a "VIN swap" in the absence of physical signs that the dashboard VIN has been tampered with.

5. This case also raises the issue of whether law enforcement officers may avoid the effect of a database search that was admittedly performed by claiming ignorance of its results. Petitioner submits that this would be an untenable result and that a presumption akin to the collective knowledge doctrine should apply. The collective knowledge doctrine provides that what is known to any of the officers conducting an investigation must be imputed to all of them. See United States v. Colon, 250 F.3d 130, 135 (2d Cir. 2001). This is a doctrine most often invoked to *justify* searches on the basis of information known to one, but not necessarily all, of the investigating officers, but this Court should find it equally applicable to situations where the information known to one of the investigating officers *negates* the grounds for a search.

The evidence at the suppression hearing in this case was unclear as to exactly which officer did the Rugby search - all of them admitted that the search had been done, but none of them admitted to doing it. Petitioner submits that, given Officer Azcona's testimony that he gave the Rugby device to Officer Haskovic and received it back from Officer Haskovic (A316, 321, 324), it may be inferred that Officer Haskovic did the search and knew of its results. But even if this Court were to find otherwise,

petitioner submits that knowledge of the Rugby search results must be imputed to all the officers under the collective knowledge doctrine.

Invocation of the collective knowledge doctrine is particularly appropriate in cases such as this one for at least two reasons. First, given Sergeant Alston's testimony that the Rugby search is the first thing done at a traffic stop (A392) and that it was standard practice to review the Rugby results immediately (A441-42), it is equitable, and not unduly burdensome, to impute knowledge of the database results to the officers at the scene. And second, if the doctrine is not applied, it would be easy for officers to escape accountability for an unlawful seizure simply by professing a lack of knowledge as to which one of them did a database search. The law should not encourage this sort of caginess on the part of law enforcement officers for the purpose of making an end run around their constitutional obligations.

6. Finally – as to an issue not decided by the Second Circuit, but one that is of some weight in determining whether to grant certiorari in this case – this is not a case in which the government can avail itself of a "good faith" exception to suppression. The traffic stop in this case occurred on May 25, 2015, a month and four days after Rodriguez was decided. Moreover, there was no room for ambiguity in the Rodriguez Court's holding. This Court in Rodriguez held in no uncertain terms, and in plain English, that there is no such thing as a "de minimis" unlawful detention following the completion of a traffic stop. There was thus no room for doubt about whether Rodriguez overruled prior circuit court precedent that did make use of a "de minimis" standard.

As such, any prolongation of a post-Rodriguez stop such as the instant case cannot possibly have been conducted in "objectively reasonable reliance" on "binding appellate precedent" so as to invoke the good-faith rule of Davis v. United States, 564 U.S. 229, 247 (2011). Rodriguez, not any pre-Rodriguez circuit court case, was the "binding appellate precedent" when Mr. Wallace was stopped, and given the direct contradiction between any such prior cases and the Rodriguez holding, any further reliance on the prior cases could not possibly be "objectively reasonable," whether or not the Second Circuit had as yet explicitly acknowledged that the prior cases had been overruled. See United States v. Ganias, 755 F.3d 125, 140 (2d Cir. 2014) (finding good faith rule inapplicable where "the Government's [conduct] violated precedent at the time of the search, and relevant Fourth Amendment law has not fundamentally changed since"). This Court should accordingly grant certiorari to Mr. Wallace and review the important and recurring Fourth Amendment issues implicated by this case.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
February 10, 2020

JONATHAN I. EDELSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: October 18, 2018 Decided: September 3, 2019)

Docket No. 17-0472

UNITED STATES OF AMERICA,

Appellee,

v.

TIMMY WALLACE,

Defendant-Appellant.

Before:

WINTER, POOLER, *Circuit Judges*, and ABRAMS, *District Judge*.*

Defendant-Appellant Timmy Wallace appeals from a judgment of conviction entered on February 13, 2017 in the United States District Court for the Southern District of New York (Katherine B. Forrest, *J.*). Wallace was convicted after a two-day jury trial of one count of possessing a firearm and ammunition after having been convicted of three serious drug offenses, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1), and 2. His principal argument on appeal is that the District Court erred in denying his motion to suppress the firearm, because it was discovered as the result of an unconstitutionally prolonged traffic stop. Wallace also challenges several of the District Court's factual findings and argues that he was improperly sentenced pursuant to the enhanced sentencing provisions of the Armed Career Criminal Act ("ACCA"). We affirm both the District Court's denial of the motion to suppress and Wallace's sentence under ACCA.

* Judge Ronnie Abrams, of the United States District Court for the Southern District of New York, sitting by designation.

Judge Pooler dissents in a separate opinion.

AFFIRMED.

SAGAR K. RAVI (HAGAN SCOTTEN, *on the brief*) *for* Geoffrey S. Berman, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, N.Y.

JONATHAN I. EDELSTEIN, EDELSTEIN & GROSSMAN, New York, N.Y., *for* Timmy Wallace.

RONNIE ABRAMS, *District Judge*:

Defendant-Appellant Timmy Wallace appeals from a judgment of conviction entered on February 13, 2017, in the United States District Court for the Southern District of New York (Katherine B. Forrest, *J.*). Wallace was convicted after a two-day jury trial of one count of possessing a firearm and ammunition after having been convicted of three serious drug offenses, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1), and 2. The District Court determined that Wallace was subject to the enhanced sentencing provisions of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), and sentenced him principally to 15 years of imprisonment to be followed by one year of supervised release. On appeal, Wallace argues that the District Court erred in denying his motion to suppress the firearm and improperly sentenced him under ACCA. We reject both arguments and affirm the judgment of conviction.

BACKGROUND

I. Factual Background[1]

On the evening of May 25, 2015, Officers Harris Haskovic, Michael Monahan, and Sergeant David Alston were traveling in a patrol car near the corner of Webster Avenue and East 173rd Street in New York City. At approximately 7:20 p.m., they observed a defective brake light on the vehicle in front of them and pulled the vehicle over.

Haskovic and Monahan approached the vehicle, while Alston remained in the patrol car. As they approached, the officers observed scratches and dents all around the car and broken glass on the windshield. They noticed a pizza delivery sign on the top of the vehicle and two passengers in the backseat. When the officers asked the driver, Wallace, for his driver's license and registration, Wallace provided his license, but stated that he did not have a copy of his registration.

While standing next to the vehicle, the officers observed scratch marks and chipped paint on the top right corner of the driver's side door. The damage indicated to both officers that someone had pried open the door in order to forcibly enter the vehicle. The officers further observed that the registration sticker and inspection

[1] Unless otherwise noted, the factual background is drawn from the factual findings and credibility determinations of the District Court.

certificate on the windshield were damaged and faded. Both stickers appeared to have been peeled off and taped back onto the windshield.

The officers asked Wallace about the condition of the stickers. Wallace stated that the damage had been caused by a defogging spray—an explanation that Haskovic testified was inconsistent with his personal experience with defogging agents. Haskovic and Monahan also asked Wallace about the scratch marks on the top right corner of the driver's side door. Wallace responded that the damage was caused on a prior occasion when he forcibly entered his vehicle after locking himself out of it.

Because of the damage to the registration sticker, the Vehicle Identification Number ("VIN") printed on the registration sticker was only partially visible. The VIN is a 17-digit number that uniquely identifies each vehicle and is required by law to be printed on each vehicle in multiple locations. 49 CFR § 565.13. Among other locations, the VIN must be printed on the vehicle's registration sticker and on the Federal Label, which is a sticker affixed to the "hinge pillar, door-latch post, or the door edge that meets the door-latch post, next to the driver's seating position" (the "doorjamb"). 49 C.F.R. § 567.4. Another VIN—referred to as the "Public VIN"—must also be printed somewhere inside the passenger compartment, in a location visible to a person "whose eye-point is located outside the vehicle adjacent to the left windshield pillar." 49 C.F.R. §565.13(f). Although the VIN on Wallace's registration

sticker was only partially legible, the officers were able to view the full Public VIN—which was displayed on the dashboard—from the outside of the car.

On a lawfully owned and registered vehicle, the VIN printed on one location will be identical to the VIN printed on every other location throughout the vehicle. The same is not necessarily true of a stolen vehicle. Haskovic testified at the suppression hearing that he had been trained in auto crime school about a technique known as a "VIN swap," whereby a VIN from one vehicle is removed and placed onto a stolen vehicle of a similar make and model. Monahan and Alston testified similarly about VIN swaps. In the case of a VIN swap, the VIN that is publicly visible—printed on the vehicle's registration sticker and/or dashboard—may fail to match up with the VIN printed on other locations throughout the vehicle, which may be more difficult to locate or impossible to remove. A successful VIN swap will disguise auto theft if the police, when running a report on the vehicle, rely exclusively on the VIN that is publicly visible, rather than cross-checking that number with an additional VIN.

Given their knowledge of VIN swaps and the various suspicious circumstances at the scene—the signs of forced entry, Wallace's missing registration, and the damaged and taped-on condition of the registration and inspection stickers—Haskovic and Monahan suspected that Wallace's vehicle may have been stolen. The officers thus decided to check if the VIN that was printed on the dashboard matched

up with another VIN printed elsewhere on the vehicle. Because the VIN printed on the registration sticker was only partially legible, they decided to check the VIN that is required to be printed on the Federal Label affixed to the doorjamb. Haskovic, accordingly, asked Wallace if he could open the driver's side door. Wallace consented and, upon opening the car door, the officers observed that the Federal Label was missing. After questioning Wallace about the missing Federal Label, the officers arrested Wallace for violating section 170.70 of the New York Penal Law ("NYPL"), which prohibits "knowingly possess[ing] . . . a vehicle or vehicle part from which a vehicle identification number label, sticker, or plate has been removed[.]" The arrest occurred at approximately 7:29 p.m.

Seven minutes earlier, at approximately 7:22 p.m., one of the officers at the scene searched Wallace's name through law enforcement databases using a portable electronic device called a Rugby. The Rugby device returned a report that displayed, among other information, Wallace's driver's license, license plate, and VIN. The information in the report matched the VIN on the dashboard, Wallace's driver's license, and the license plate that the officers observed at the scene.

Although it is clear that the report was run at 7:22 p.m., and that the traffic stop concluded at 7:29 p.m., it is not clear when the Rugby report was run in relation to the other events that occurred during the traffic stop. It is also not clear which of the officers ran the Rugby report. At the suppression hearing, Haskovic and Monahan

both testified that they did not recall a Rugby report having been run at the scene. Alston testified that he knew a Rugby report was run, but that he could not recall who ran it and never saw the results. Alejandro Azcona, an officer who had pulled over to assist during the traffic stop, testified that when he arrived at the scene, he gave his Rugby device to Haskovic, because none of the officers present had one. He further testified, however, that he could not recall whether any of the officers had used the device to run a report on Wallace.

After arresting Wallace, Haskovic drove Wallace's car back to the precinct, vouchered it as arrest evidence, and he and Monahan performed an inventory search of the vehicle. Pursuant to the standard procedures for inventory searches, Haskovic searched under the hood of the car. While doing so, Haskovic had the added purpose of searching for another VIN, which he expected to be printed on either the engine block or transmission. Upon opening the hood of the car, Haskovic saw a black grocery bag hanging behind the passenger side headlight. He picked up the bag and, inside it, found another bag, which was zipped closed. Haskovic unzipped the bag and saw the butt of a handgun. After notifying Monahan and Alston, and conferring with the evidence collection team, Haskovic vouchered the firearm and completed the inventory search.

App. 7

II. District Court Proceedings

On November 12, 2015, Wallace was charged by Information with one count of possessing a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 2. On March 29, 2016, the Superseding Indictment was filed, charging Wallace with the same offense, but further alleging that his three prior drug convictions rendered him subject to the enhanced sentencing provisions of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). Wallace moved to suppress the firearm, his DNA found on the firearm, and the statements he made after the arrest. On July 12 and August 1, 2016, the District Court held a suppression hearing. Haskovic, Monahan, Alston, Azcona, and Wallace all testified, as did an investigator who conducted a brake light test on Wallace's vehicle, as well as a sergeant who determined that the Rugby report had been run at the scene of the traffic stop at 7:22 p.m.

After the hearing, the District Court denied Wallace's motion to suppress in a written opinion. The District Court found that the officers' testimony was "generally credible" and that Wallace's testimony was "generally not credible." The Court explained that, at the suppression hearing, Wallace "had a flat affect," "showed little to no emotion," and had a general demeanor that was "unsupportive of someone who was being completely forthcoming." The Court specifically discredited several portions of Wallace's testimony, including his explanation for the damaged condition

of his registration and inspection stickers. By contrast, the Court specifically credited portions of the officers' testimony, including Haskovic's testimony about his training on VIN swaps and the officers' testimony that Wallace had consented to the opening of his car door.

The District Court made several specific factual findings, including that Wallace had been driving with a defective brake light, that he had consented to the opening of his car door, that he knew his vehicle was missing a Federal Label, and that Haskovic was both conducting an inventory search and looking for an additional VIN when he found the firearm under the hood of Wallace's car. The Court held that the traffic stop was lawful at its inception and that, at the time of the arrest, the officers had probable cause to believe that Wallace had violated NYPL § 170.70. The Court further held that the firearm was discovered during a lawful inventory search, and that Wallace's additional investigatory purpose of searching for the VIN did not affect the legality of that search. Accordingly, the District Court denied Wallace's motion to suppress.

After a two-day trial in September of 2016, the jury returned a guilty verdict. On February 10, 2017, the District Court held a sentencing hearing. The District Court determined that Wallace had been convicted of at least three prior offenses which constituted "serious drug offenses" within the meaning of ACCA. First, Wallace had been convicted in 1998 of two separate counts of attempted criminal sale of a

controlled substance in the third degree. He was sentenced for both of these convictions in April of 1999 and the parties refer to these two convictions collectively as the "1999 drug conviction." Second, Wallace had been convicted in 2001 for criminal sale of a controlled substance in the third degree. Third, Wallace had been convicted in 2010 for criminal sale of a controlled substance in the second degree. The District Court determined that each of these convictions qualified as a predicate offense under ACCA, and that Wallace was therefore subject to the 15-year minimum term of imprisonment required by that statute. Accordingly, the District Court imposed a sentence of 15 years of imprisonment, one year of supervised release, and a $100 mandatory special assessment. The District Court noted that "if there were a change in the law and I wasn't required to sentence you to fifteen years, I would sentence you to ten."

DISCUSSION

Wallace's principal argument on appeal is that the District Court erred in denying his motion to suppress, because the traffic stop that led to the discovery of the firearm was unconstitutionally prolonged under the standards articulated by the Supreme Court in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).[2] Wallace also argues that the District Court's denial of his motion to suppress was based on

[2] Although not decided by the District Court in its denial of the motion to suppress, this issue was raised before the District Court during the suppression hearing. Because this case presents no need for additional fact-finding, and only questions of law remain, we exercise our "broad discretion" to consider the issue for the first time on appeal. *See Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000).

erroneous factual findings, and that he was improperly sentenced under ACCA because he had not previously been convicted of three "serious drug offense[s]" within the meaning of that statute. 18 U.S.C. § 924(e)(1).

"On appeal from a denial of a suppression motion, we review a district court's findings of fact for clear error, and its resolution of questions of law and mixed questions of law and fact *de novo*." *United States v. Gomez*, 877 F.3d 76, 85 (2d Cir. 2017). We "pay special deference to the district court's factual determinations going to witness credibility." *United States v. Jiau*, 734 F.3d 147, 151 (2d Cir. 2013).

I. Motion to Suppress

Wallace argues that the District Court improperly denied his motion to suppress the firearm principally on the ground that it was discovered as the result of an unconstitutionally prolonged traffic stop. In a supplemental brief filed on his own behalf, Wallace (who is counseled) also argues that the District Court improperly denied his motion based on erroneous factual findings. We reject both arguments.

A. Duration of the Traffic Stop

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809–10 (1996). "Therefore, traffic stops must satisfy the Fourth Amendment's reasonableness limitation, which requires that an officer making a

traffic stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." *Gomez*, 877 F.3d at 86 (internal quotation marks omitted). Even if lawful at its inception, a traffic stop "can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

Consistent with these principles, the Supreme Court in *Rodriguez v. United States* held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." 135 S. Ct. at 1612. Because a traffic stop's "mission" is to "address the traffic violation that warranted the stop and attend to related safety concerns . . . [a]uthority for the seizure [] ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id*. at 1614 (internal citations omitted). These tasks include both "determining whether to issue a traffic ticket" and conducting "ordinary inquiries incident to the traffic stop," such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 1615. Unlike such "ordinary inquiries," however, unrelated investigations into criminal wrongdoing may be conducted, absent reasonable suspicion, only if they "[do] not lengthen the roadside detention." *Id.* at 1614. Thus, while an officer

completing a lawful traffic stop may conduct "certain unrelated checks . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 1615 (internal citations omitted).

As *Rodriguez* confirms, however, a traffic stop may be extended beyond the point of completing its mission "if an officer develops a reasonable suspicion of criminal activity[.]" *United States v. Foreste*, 780 F.3d 518, 523 (2d Cir. 2015); *see also Rodriguez*, 135 S. Ct. at 1616–17 (remanding for further consideration as to whether the prolongation of the traffic stop was justified by reasonable suspicion). Reasonable suspicion "demands specific and articulable facts which, taken together with rational inferences from those facts, provide detaining officers with a particularized and objective basis for suspecting legal wrongdoing." *United States v. Singletary*, 798 F.3d 55, 59 (2d Cir. 2015) (internal citations and quotation marks omitted). In assessing reasonable suspicion, courts look at "the totality of the circumstances through the eyes of a reasonable and cautious police officer on the scene, whose insights are necessarily guided by his experience and training." *Id.* at 60. Courts do not, however, "merely defer to police officers' judgment." *Id.*

Wallace argues that, under *Rodriguez*, the traffic stop that led to his arrest was unconstitutionally prolonged. He contends that by 7:22 p.m., when the Rugby report revealed that a vehicle with the same license plate number and a VIN matching the VIN on the dashboard of the vehicle at the scene was registered to Wallace, the officers

had "all of the information needed," *Gomez*, 877 F.3d at 90, to complete the mission of the stop. Moreover, Wallace argues, the results of the Rugby report necessarily dispelled any reasonable suspicion that the vehicle may have been stolen. Thus, according to Wallace, the remaining seven minutes of the stop were an unconstitutional detention, rendering the evidence derived from it inadmissible.

Wallace's argument assumes that the results of the Rugby report (1) necessarily resolved any "ordinary inquiries incident to the traffic stop," 135 S. Ct. at 1615 (brackets omitted), and (2) conclusively dispelled any reasonable suspicion that the car was stolen. While we express no view on the former proposition, we reject the latter under the circumstances of this case.[3]

Initially, we observe that—absent the results of the Rugby report—it would be quite clear that the officers' limited extension of the traffic stop in this case was supported by reasonable suspicion. The officers testified that they observed a host of unusual circumstances at the scene, which collectively caused them to suspect that the vehicle may have been stolen. First, they saw scratch marks on the upper-right portion of the driver's side door, which indicated to both officers that someone had

[3] The Government, relying on *New York v. Class*, 475 U.S. 106 (1986), argues that the traffic stop was not prolonged beyond the time reasonably required to complete its mission, because the officers' efforts to inspect the VIN constituted "ordinary inquiries incident to a traffic stop" and were thus part of the traffic stop's lawful "mission," *Rodriguez*, 135 S. Ct. at 1615 (brackets omitted); s*ee also United States v. Ramos*, 723 F. App'x 632, 637 (10th Cir. 2018) (relying on *Class* to hold that an officer's effort to confirm a VIN by inspecting the vehicle's doorjamb was, "like a demand to see license and registration papers, [] within the scope of police authority pursuant to a traffic violation stop."). Because we hold that the prolongation of the instant traffic stop was justified by the officers' reasonable suspicion that the car was stolen, we do not decide whether *Class* provides an independent basis to affirm the judgment of the District Court.

forcibly entered the vehicle. Wallace, in fact, admitted that the scratch marks had been caused by a forced entry (though he claimed that he had broken into his own car after locking himself out). Second, Wallace was unable to produce the registration for his vehicle. Third, the vehicle's registration and inspection stickers were damaged (affecting the visibility of the VIN on the registration sticker) and appeared to have been tampered with and re-taped onto the windshield. Finally, when questioned about the condition of these stickers, Wallace stated that they had been damaged by a defogging spray, an explanation the officers found not to be credible. The officers' testimony about these unusual circumstances was credited by the District Court and, in some cases, corroborated by Wallace's own testimony and by photographic evidence. These "specific and articulable facts" provided the officers with a "particularized and objective basis for suspecting legal wrongdoing," which—at least absent the results of the Rugby report—amply sufficed to establish reasonable suspicion. *Singletary*, 798 F.3d at 59; *cf. Foreste*, 780 F.3d at 526 (holding that, where the driver provided an expired rental agreement and appeared to have an uneasy demeanor, an officer had reasonable suspicion that the car was stolen); *United States v. Lewis*, 712 F. App'x 83, 84 (2d Cir. 2018) (summary order) (holding that the officers had reasonable suspicion to prolong a traffic stop where a rental car lacked the usual barcode, the officers observed six air fresheners in the car, and the driver and

passenger gave inconsistent information about the nature of their relationship and their trip).

The only question remaining, then, is whether the results of the Rugby report necessarily dispelled that reasonable suspicion. Under the circumstances of this case, we conclude that it did not. Assuming for the purposes of this opinion that all of the officers at the scene knew about the results of the report[4]—though, as noted above, the record on that point is far from clear—the officers here were justified in extending the traffic stop for the limited purpose of confirming the VIN in one non-public, minimally intrusive location. As explained above, Haskovic testified at the suppression hearing that a Rugby report which indicates that a visible VIN on a stopped vehicle is the same VIN that is registered to the driver does not necessarily provide conclusive proof that the vehicle is, in fact, not stolen. Instead, in the case of a VIN swap, a Rugby report could fail to identify a stolen vehicle, because it would provide information about a vehicle other than the (stolen) one that had been pulled over. It is for that reason that examination of a non-public VIN may, in such circumstances, be helpful to determining if a vehicle has been stolen. The District

[4] Wallace argues that if any officer at the scene knew about the results of the Rugby report, that officer's knowledge must be imputed to the remaining officers under the collective knowledge doctrine. Because we hold that reasonable suspicion was present in this case even if all of the officers knew about the results of the Rugby report, we do not here decide whether the collective knowledge doctrine applies under the circumstances of this case.

Court credited Haskovic's testimony about his training on VIN swaps, and we see no clear error in that credibility determination.[5]

Given Haskovic's testimony that, in the event of a VIN swap, a Rugby report might fail to detect that a vehicle is stolen, it is not true, as Wallace urges, that the results of the Rugby report necessarily dispelled the officers' otherwise-reasonable suspicion that the car was stolen. Here, there were numerous other factors suggesting that Wallace's vehicle not only may have been stolen, but more specifically, that it may have been subjected to a VIN swap—the very circumstance under which, according to Haskovic's training, a stolen vehicle might successfully evade detection by a Rugby report. These factors included that the vehicle had indisputably been broken into, the damaged and taped-on condition of the registration sticker, Wallace's inability to produce his registration, and his suspicious explanations for the condition of his vehicle. The officers were thus presented not only with a specific and articulable basis for suspecting that the vehicle was stolen, but also with a specific and articulable

[5] Contrary to the dissent's assertions, Haskovic did not "testif[y] quite differently from the other officers regarding reasonable suspicion." Dissent at 9. Like Haskovic, Monahan testified that he suspected that Wallace's vehicle may have been stolen. App'x 311 ("It led to the suspicion that yes, it possibly could have been stolen."). Monahan further testified that he and Haskovic jointly decided to check the Federal Label because they "were looking for another place, another location on the vehicle that would match the VIN number to the public VIN to make us feel more confident that that public VIN did in fact belong to the vehicle." *Id.*; *see also* App'x 277. Similarly, Alston testified that he was familiar with VIN swaps and provided a description of the technique that was consistent with Haskovic's. *See* App'x 408 ("A VIN swap is when one vehicle and another vehicle, they have the same body style, make, and one person, they steal the vehicle, and they use the other VINs from the nonstolen vehicle to pass as their own."). In the portion of Alston's testimony quoted by the dissent, Alston merely confirmed that "there was no *notation* [in any Rugby report] that [he was] aware of that this car was stolen." App'x 443 (emphasis added). Alston elsewhere clarified that he "didn't see any results" of a Rugby report, App'x 419, and he never testified—as suggested by the dissent—that the officers at the scene had no reasonable basis to suspect that the car was stolen.

basis for doubting the conclusiveness of the Rugby report. The officers were not required to ignore both their training and the unusual circumstances at the scene and to defer, instead, to a Rugby report, whose effectiveness at detecting auto theft they had reason to question under the circumstances.

It may be true that, under most circumstances, a Rugby report run during a traffic stop would confirm ownership of a vehicle and dispel any reasonable suspicion of auto theft. But we cannot agree with Wallace that such a report *necessarily* dispels reasonable suspicion of a stolen vehicle, regardless of the other circumstances that may be present at the scene. Reasonable suspicion is evaluated based on the totality of the circumstances. Here, there were numerous factors suggesting both that Wallace's vehicle may have been stolen and that the results of the Rugby report may have been inconclusive. These circumstances lead us to conclude that the officers reasonably formed the suspicion, despite the Rugby report, that "criminal activity may [have been] afoot." *Singleton*, 798 F.3d at 60; *see Lewis*, 712 F. App'x at 84.

The dissent does not disagree that "under certain circumstances . . . a Rugby report may not dispel suspicion" of a stolen vehicle. It argues, instead, that the confluence of suspicious circumstances presented at this traffic stop was not enough, primarily because in this case there was no visible damage to the Public VIN on the dashboard. We respectfully disagree. Although it is true that the officers here did not observe any damage to the Public VIN, they did observe considerable damage to

the VIN on the registration sticker, which looked like it had been peeled off and taped back onto the windshield. As explained above, this factor—along with the undisputed signs of forced entry, the missing registration, and the driver's suspicious explanations for the condition of his car—gave rise to a reasonable suspicion that the car was stolen and that the theft was accomplished using a method specifically designed to evade detection by a Rugby, or similar, report. Unlike the dissent, we do not think that noticeable damage to the Public VIN is essential to establish reasonable suspicion of auto theft if a Rugby report indicates that a vehicle has not been stolen or otherwise does not yield suspicious results.

The officers' extension of the traffic stop in this case, moreover, was limited and narrowly tailored to their reasonably-formed suspicions. The officers briefly questioned Wallace about the scratch marks on his door and the condition of his registration sticker, and then quickly sought to confirm the VIN by cross-checking it in one additional location. The location they checked (the doorjamb) was minimally intrusive, and before proceeding to inspect it, they obtained Wallace's consent. A total of nine minutes elapsed between when the officers pulled over Wallace's vehicle at 7:20 p.m. and when they arrested him at 7:29. Given all these circumstances, we conclude that the officers "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly," *Foreste*, 780 F.3d at 526, and that the

duration of the traffic stop was reasonable and consistent with the requirements of the Fourth Amendment.

B. The District Court's Factual Findings

Wallace next argues that the District Court erred in concluding that (1) his brake light was defective, (2) he consented to the opening of his car door, (3) Wallace knew that the Federal Label was missing, and (4) Haskovic found the firearm while conducting an inventory search of the vehicle, during which he had the added purpose of searching for an additional VIN.

We review the factual findings of the District Court for clear error. *United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012). "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." *Id*. "When, as here, credibility determinations are at issue, we give particularly strong deference to a district court finding." *Id.* at 189.

We find no clear error in the factual findings of the District Court, which were supported by evidence in the record and appropriately informed by its credibility determinations. Most of the factual findings required the District Court to resolve the competing testimonies of Wallace, on the one hand, and the officers, on the other. The Court did so based on its assessment of the witnesses' credibility, which it described in its opinion. Having reviewed the testimonies of the witnesses and the credibility

determinations of the District Court, we cannot say that we are left with the "definite and firm conviction that a mistake has been committed." *Id.* at 188. Accordingly, we conclude that the District Court did not clearly err in reaching the factual findings challenged by Wallace.

II. Eligibility under ACCA

Lastly, Wallace argues that the District Court erred in sentencing him pursuant to the enhanced penalty provisions of ACCA. Under ACCA, a person who violates 18 U.S.C. § 922(g) who has "three previous convictions . . . for a violent felony or serious drug offense . . . shall be fined under this title and imprisoned not less than fifteen years[.]" 18 U.S.C. § 924(e)(1). A "serious drug offense" includes, as relevant here, "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law[.]" 18 U.S.C. § 922(e)(2)(A)(ii). Wallace argues that two of his prior drug convictions—the 1999 conviction and the 2001 conviction—do not fit within this definition. We hold that both offenses constitute "serious drug offense[s]" within the meaning of the statute.

A. The 1999 Conviction

Wallace first argues that his 1999 conviction for attempted criminal sale of a controlled substance in the third degree does not qualify as a "serious drug offense."

He points out that because the statute under which he was convicted, NYPL § 220.39, prohibits "knowingly and unlawfully sell[ing] a narcotic drug," and "to sell" for the purposes of the law is defined as "to sell, exchange, give or dispose of to another, o*r to offer or agree to do the same*," NYPL § 220.00(01) (emphasis added), a conviction, like his, for *attempted* criminal sale of a controlled substance requires only an attempt to "offer or agree" to sell a narcotic drug. Wallace argues that an attempt to "offer or agree" to sell a narcotic drug does not fall within ACCA's definition of a "serious drug offense," because it does not "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance[.]" 18 U.S.C. § 922(e)(2)(A)(ii).

Wallace's argument fails because we have previously "reject[ed] [the] contention that attempts to commit a serious drug offense [are] not themselves meant to be considered serious drug offenses." *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003). In *King*, we explained that, in light of the "expansive connotations" of the word "involving," ACCA's definition of a serious drug offense "must be construed as extending the focus of § 924(e) beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct." *Id.* Thus, in *King*, we held that a conviction for attempted possession of cocaine in the third degree, which was punishable by a term of imprisonment of up to 15 years, "was a conviction for a serious drug offense"

within the meaning of ACCA. *Id.* at 114–15. Similarly, in *Rivera v. United States*, 716 F.3d 685, 690 (2d Cir. 2013)—while addressing a different challenge to the applicability of ACCA—we held that a conviction for attempted criminal sale of a controlled substance under the same statute that is at issue here "count[ed] as a predicate 'serious drug offense' under ACCA."

The same is true in this case. If an attempt to possess a controlled substance "involv[es] . . . possessing . . . a controlled substance," *King*, 325 F.3d at 114, so too does an attempt to sell—or to offer or agree to sell—a controlled substance "involv[e] . . . distributing . . . a controlled substance." Wallace's 1999 conviction, which at the time was punishable by up to 15 years of imprisonment, thus qualifies as a "serious drug offense" under *Rivera* and *King*.

B. The 2001 Conviction

Wallace next argues (on his own behalf) that his 2001 conviction for criminal sale of a controlled substance in the third degree no longer constitutes a "serious drug offense," because the maximum penalty for that crime—which was 25 years at the time of his conviction—has since been reduced to nine years. *See* 18 U.S.C. § 922(e)(2)(A)(ii) (defining a serious drug offense as one "for which a maximum term of imprisonment of ten years or more is prescribed by law"). Although the Supreme Court held in *McNeill v. United States*, 563 U.S. 816, 817–18 (2011), that the maximum sentence *at the time of conviction* is the "maximum term of imprisonment" for ACCA

purposes, Wallace points out that *McNeill* does not squarely foreclose his argument because *McNeill*, unlike this case, "[did] not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id*. at 825 n.1. Wallace argues that because New York's Drug Law Reform Act of 2009 both reduced the maximum penalty applicable to his offense and, under some circumstances, permitted the resentencing of previously-convicted defendants, the current nine-year maximum penalty should apply, making his 2001 conviction no longer a "serious drug offense" under ACCA.

Wallace's argument fails because, as the District Court held, even if Wallace were correct that the current maximum penalty applied, his 2001 offense would still qualify as a "serious drug offense," because the maximum penalty for his offense under current law is twelve years, not nine. This is because Wallace's 2001 conviction was his second felony drug conviction and, under current New York law, "second felony drug offenders" are sentenced more harshly than first-time offenders. Specifically, for a first-time felony drug offender convicted of a Class B felony, "the term [of imprisonment] shall be at least one year and shall not exceed nine years," NYPL § 70.70(2)(a)(i), whereas for a "second felony drug offender" convicted of the same, "the term [of imprisonment] shall be at least two years and shall not exceed twelve years," NYPL § 70.70(3)(b)(i). Thus, contrary to Wallace's argument, the

maximum penalty applicable to his 2001 conviction was, even under current law, "ten years or more," 18 U.S.C. § 924(e)(1). The 2001 conviction thus qualifies as a predicate "serious drug offense" under ACCA. *See United States v. Rodriguez*, 553 U.S. 377, 393 (2008) (holding that the maximum term of imprisonment for ACCA purposes was the maximum term set by the state law's applicable recidivist provision, rather than the maximum term that would apply without the recidivist enhancements); *see also United States v. Gordon*, 723 F. App'x 30, 32 (2d Cir. 2018) (summary order) (applying the term of imprisonment prescribed by New York's applicable recidivist enhancements to hold that the defendant's prior drug convictions were serious drug offenses under ACCA).

Accordingly, both Wallace's 1999 conviction and his 2001 conviction were "serious drug offenses" under ACCA, and the District Court properly imposed sentence pursuant to ACCA's enhanced sentencing requirements.

CONCLUSION

For the foregoing reasons, the judgment of conviction is affirmed.

POOLER, *Circuit Judge*, dissenting:

The lawful traffic stop in this case ended at 7:22 p.m. At that point, (1) the officers viewed the full public VIN on the dashboard of Timmy Wallace's vehicle; (2) they observed no signs of tampering with the dashboard plate; and (3) the results of a Rugby report—a comprehensive records check through every NYPD database—matched the dashboard VIN plate and confirmed that the vehicle belonged to Wallace. Wallace should have been issued a citation for his defective brake light and been on his way, delivering pizzas in the Bronx.

Instead, despite the Rugby results that confirmed the vehicle belonged to Wallace, the officers kept going. What should have been a two-minute traffic stop snowballed into Wallace's arrest for a missing doorjamb VIN sticker, an inventory search of his car, which revealed a firearm, and his ultimate sentence of 15 years' imprisonment under ACCA. Because the traffic stop that led to Wallace's arrest was unconstitutionally prolonged, I would reverse the denial of Wallace's suppression motion, vacate his conviction, and remand.[1]

This case presents a simple question: did the Rugby report dispel the officers' reasonable suspicion that the vehicle was stolen? The majority responds

[1] I concur in the majority opinion with respect to the district court's factual findings and Wallace's eligibility under ACCA, if the firearm were admissible.

that it did not. It relies solely upon its view of Officer Haskovic's testimony—"that, in the event of a VIN swap, a Rugby report might fail to detect that a vehicle is stolen"—to reason in a circular fashion that the Rugby report did not dispel the officers' reasonable suspicion because of the officers' reasonable suspicion. *See* Maj. Op. at 17-18. I cannot agree. The 7:22 p.m. results of the Rugby report dispelled any reasonable suspicion that Wallace's vehicle was stolen. Accordingly, I must respectfully dissent.

A. The Results of the Rugby Report Dispelled Any Reasonable Suspicion that the Vehicle Was Stolen.

"A traffic stop may be extended for investigatory purposes if an officer develops a reasonable suspicion of criminal activity supported by specific and articulable facts." *United States v. Foreste*, 780 F.3d 518, 523 (2d Cir. 2015); *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (explaining that an officer "may not . . . prolong[] the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual"). Here, the officers did not have reasonable suspicion supported by specific and articulable facts to detain Wallace and continue investigating after 7:22 p.m.

At 7:20 p.m., Wallace was stopped for a defective brake light. He produced a valid driver's license but not his registration card. The officers observed that

the registration and inspection stickers were in bad shape, with only 12 of the 17 VIN digits legible on the sticker, and there were tool marks on the driver's door, which Wallace attributed to having locked himself out at some point. Haskovic observed that the keys were in the ignition. The car was in a generally poor condition, with scratches and dents all over. "Both officers Haskovic and Monahan testified that they observed the public VIN on the dashboard of the vehicle, and that the digits on the public VIN matched the legible digits of the digits printed on the registration sticker." *United States v. Wallace*, No. 15-cr-794, 2016 WL 4367961, at *3 n.8 (S.D.N.Y. Aug. 11, 2016). There was no indication the dashboard VIN plate was tampered with in any way.

At 7:22 p.m., a Rugby report was generated, and the immediate results included Wallace's license plate, registration, VIN number, make of vehicle, date of birth, and address, and whether the car was reported stolen. The VIN in the report matched the full VIN on the dashboard plate, and the results confirmed that the vehicle was registered to Wallace. Accordingly, the officers had sufficient information in their possession by 7:22 p.m. that they never should have proceeded to the next step of examining the internal doorjamb VIN.

Under these circumstances, it is of no moment that the public VIN was cross-checked against the Rugby report rather than the registration sticker.[2] A VIN swap requires physical movement of the VIN plate from one vehicle to another. *See United States v. Thomas*, 973 F.2d 1152, 1155 (5th Cir. 1992); *see also People v. Joiner*, 84 Cal. App. 4th 946, 954 (2000) (explaining that a VIN "switch" or swap occurs where a dashboard "VIN plate is removed from the dash of a junked vehicle and placed on a stolen vehicle"). Despite the majority's belief, this movement bears signs. *See, e.g.*, *Thomas*, 973 F.2d at 1156 n.3 (officer suspected VIN swap where dashboard VIN plate "had been burned and repainted"); *Lopez v. United States*, Nos. cv-f-07-1449, cr-f-03-5204, 2009 WL 1657334, at *2 (E.D. Cal. June 9, 2009) (officers suspected VIN swap where dashboard VIN plate "was spray painted black and was glued on the dash board rather than having factory rivets"); *Joiner*, 84 Cal. App. 4th at 954-55 (DMV licensing inspector verifies VINs on vehicles by visually inspecting dashboard VIN plates and "report[ing] any irregularities, including scratches or marks, in the VIN plates to the DMV"); *People v. Hernandez*, No. B199604, 2008 WL 4716883, at *4 (Cal. Ct. App. Oct. 28, 2008) (officers suspected VIN swap where dashboard VIN plate was framed by

[2] The 12 digits of the 17 that were legible on the sticker likewise matched the records check and the dashboard VIN plate.

"blue tape around the upper edge of the windshield" and the "VIN on the dashboard plate did not match the VIN reflected in DMV records"); *People v. Mesa*, No. B199706, 2008 WL 525808, at *1 (Cal. Ct. App. Feb. 28, 2008) (officer suspected VIN swap where dashboard VIN plate had "scratches" and the plate "had bubbling that usually occurs when there is adhesive being applied, tending to melt part of the paint"); *see also Brocato v. Perez*, No. cv 13-8993, 2017 WL 6033046, at *2 (C.D. Cal. Oct. 4., 2017) (officers suspected VIN swap where suspicious indicia were present and records check demonstrated VIN was not on file with DMV); *Renteria v. State*, 199 S.W.3d 499, 501 (Tex. Crim. App. 2006) (officers suspected VIN swap where dashboard VIN plate was removed from abandoned salvage vehicle and records check demonstrated VIN had recently been re-registered). Here, where an untampered-with dashboard VIN plate checked out against a comprehensive records check, it was virtually impossible for the vehicle nonetheless to have been stolen or VIN-swapped.

Attempting to brush aside this conundrum, the government asserts: "[T]he Officers were not acting on a reasonable suspicion that a VIN swap had occurred[.]" Appellee's Br. at 27 n.6. Rather, the government explains, "they were acting on a reasonable suspicion that the Vehicle may have been stolen. The

possibility of a VIN swap is relevant only because it helps explain why the 7:22 Inquiry could not have fully dispelled a reasonable suspicion of theft based on many other facts." *Id.* But the only way the officers could have suspected the vehicle "may have been stolen" at this point was if a VIN swap had occurred. The only facts marshaled in support of this theory are the missing registration, damaged sticker, and tool marks, the very facts underlying the initial reasonable suspicion that the Rugby search dispelled.

Likewise, the unvarying chorus throughout the majority opinion echoes these suspicious facts viewed "absent the results of the Rugby report," Maj. Op. at 15, "at least absent the results of the Rugby report," Maj. Op. at 16, and "despite the Rugby report," Maj. Op. at 19. The majority does not, however, grapple with the *presence* of the Rugby report. Nor does it justify its attempts to downplay the report's significance.

First, the majority reasons that the officers were presented "with a specific and articulable basis for doubting" the report because, "according to Haskovic's training, a stolen vehicle might successfully evade detection by a Rugby report." Maj. Op. at 18. Haskovic's dissatisfaction does not constitute a specific and articulable basis. A "valid dashboard VIN [is not] a legal reason to penetrate

further into the vehicle." *United States v. Caro*, 248 F.3d 1240, 1246 (10th Cir. 2001). Under these circumstances, where the dashboard VIN plate was viewed in full, there was no evidence that the plate was tampered with in any way, and the VIN and the vehicle's status were confirmed by a comprehensive records check (in the sense that the VIN matched the public VIN and the results of the Rugby report did not generate suspicion), there was no specific and articulable basis for doubting the Rugby report.

Indeed, Sergeant Chan was asked, "So based on looking at this [Rugby] report, which was run at 7:22 p.m., the officer would have known that this particular vehicle was registered to Mr. Wallace, correct?" App'x at 378. Chan responded, "That's correct." App'x at 378. Likewise, Sergeant Alston was asked, "Is it fair to say [as of] 7:22 p.m. . . . there was no notation that you were aware of that this car was stolen that [Wallace] was operating[?]" App'x at 442-43. Alston responded, "That's correct." App'x at 443.

Glossing over this testimony, the majority throws up its hands, resting entirely upon Haskovic's undeterred suspicions: "The District Court credited Haskovic's testimony about his training on VIN swaps, and we see no clear error in that credibility determination." Maj. Op. at 17. Thus, the majority determines

that what is "true" about reasonable suspicion as it relates to the possibility of a VIN swap is what Haskovic says. *See* Maj. Op. at 17 ("Given Haskovic's testimony that, in the event of a VIN swap, a Rugby report might fail to detect that a vehicle is stolen, it is not true, as Wallace urges, that the results of the Rugby report necessarily dispelled the officers' otherwise-reasonable suspicion . . . ."). But the district court credited Haskovic's testimony with respect to his VIN swap concerns in light of Wallace's argument "that the officers had an[] ulterior motive when they pulled" him over. Special App'x at 13.

Whether reasonable suspicion existed after 7:22 p.m. is a mixed question of law and fact that we review de novo. *See United States v. Gomez*, 877 F.3d 76, 92 (2d Cir. 2017). Here, the the district court explicitly declined to make findings with respect to "whether the officers had probable cause to believe that [Wallace's] vehicle was stolen." Special App'x at 20. We "cannot merely defer to police officers' judgment in assessing reasonable suspicion." *United States v Singletary*, 798 F.3d 55, 60 (2d Cir. 2015). Haskovic attended automobile crime training. Haskovic also "had only been a police officer for about three and half years at the time of the suppression hearing," Appellee's Br. at 26 (internal quotation marks and alteration omitted); had never before seen a VIN swap; and

testified quite differently from the other officers regarding reasonable suspicion. *Compare* App'x at 191 (Question: "Would it have alleviated your concerns if the VIN number that was received as part of the [Rugby] inquiry matched the public VIN on the vehicle?" Haskovic response: "Not necessarily, because of the [possibility of] a VIN swap"), *with* App'x at 378 (Question: "So based on looking at this [Rugby] report, which was run at 7:22 p.m., the officer would have known that this particular vehicle was registered to Mr. Wallace, correct?" Chan response: "That's correct.").

To be sure, under certain circumstances—such as where the public VIN plate is burned, repainted, spray painted, glued on, affixed with non-standard rivets, taped, scratched, bubbling, or tampered with in any way, or where a records check or Rugby report reveals that a VIN is not on file with the DMV or has recently been re-registered—the Rugby report may not dispel suspicion. But those circumstances were not present here. *See, e.g.*, App'x at 294 (Monahan testifying: "There wasn't any damage to the public VIN, if that's what you're asking"); App'x at 443 (Question: "Is it fair to say . . . at 7:22 p.m., or before even Mr. Wallace was arrested, there was no notation that you were aware of that this car was stolen that he was operating?" Alston answer: "That's correct.").

Next, the majority asserts that the officers were presented "with a specific and articulable basis for doubting the conclusiveness of the Rugby report." Maj. Op. at 18. But, as noted above, Chan and Alston did not testify to this effect. *See also* App'x at 166 (Haskovic's testimony that "*I* wanted to cross-reference the public VIN to" the doorjamb VIN "[b]ecause the vehicle was displaying *to me*, based on my training," continued suspicious signs (emphasis added)). Monahan testified that there was no indication of tampering with the dashboard VIN plate. Additionally, no officer testified that the results of the Rugby report were suspicious, such that examining one of the vehicle's non-public VINs would be appropriate. *Cf. Brocato*, 2017 WL 6033046, at *2; *Renteria*, 199 S.W.3d at 501.

The majority goes on to assert that the officers had reason to question the "effectiveness [of the Rugby report] at detecting auto theft." Maj. Op. at 18. But it is difficult to fathom how a comprehensive records check confirming an undamaged full dashboard VIN plate could be less "effective" than proceeding inside the vehicle to examine one of a possible 18 non-public VINs. 49 C.F.R. § 541.5. These non-public "VINs are used by law enforcement to identify a vehicle when the public VIN has been altered or removed." *Joiner*, 84 Cal. App. 4th at 954. Here, the public VIN was neither altered nor removed.

Additionally, a non-public doorjamb VIN may not match the other VINs on a vehicle, even without a VIN swap having occurred. For instance, a vehicle that was involved in an accident may well have a doorjamb VIN of a *different* vehicle after undergoing a similar like, kind, and quality repair. *See* 49 C.F.R. § 565.23(e); *id.* § 567.4; *see also* Vin's Labels LLC, http://www.vinslabels.com/what-are-replacement-vin-labels-order-vin-sticker-replacement.html (last visited July 31, 2019) ("People need replacement auto [VIN] labels when they have been in an accident and need to replace or paint parts such as the door jamb or hood of the vehicle. . . . [I]t is important that auto body and collision repair shops do not over look this aspect of car repair."). Haskovic was not justified in extending the traffic stop on the basis that it was more "effective" to open Wallace's door to inspect his internal doorjamb VIN. The traffic stop was over at 7:22 p.m.

Finally, the majority gestures to "numerous other factors" indicating a VIN swap. Maj. Op. at 18. But what were these factors? The driver's door tool marks, the registration sticker and lack of card, and Wallace's explanations that he'd locked himself out and used defogging spray that damaged the sticker, *see* Maj. Op. at 18—the very factors that gave rise to suspicion that the Rugby search dispelled. There is no evidence—visual, testimonial, or otherwise—that the

dashboard VIN plate was at all suspicious. There is no evidence that the Rugby results were incomplete; that the dashboard VIN did not match the database VIN, was not on file, or was recently re-registered; that there was a glitch and the Rugby malfunctioned; or that the officers were concerned that Wallace's database records had somehow been hacked.[3] There is no evidence that would invite suspicion, apart from the very concerns addressed by the joint dashboard VIN plate visual inspection and Rugby search. Indeed, Haskovic cited these very concerns—rather than, for example, a suspicious VIN plate—when he explained why he wanted to continue investigating.

The officers "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly": the Rugby report. *Foreste*, 780 F.3d at 526 (internal quotation marks omitted). But having their reasonable suspicions dispelled, the officers continued to detain Wallace and his vehicle and investigate anyway. The stop was unconstitutionally prolonged.

[3] Again, I note that a Rugby report can generate a VIN that matches the vehicle's public VIN but still fail to dispel suspicion under circumstances not present here; for example, a VIN may have been recently re-registered. *See supra* at 5, 9-10.

B. Examining the Internal VIN Was Not an Ordinary Inquiry Incident to the Traffic Stop.

Absent reasonable suspicion that would justify extending a traffic stop, *id.* at 523, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission—to address the traffic violation that warranted the stop and attend to related safety concerns," *Rodriguez*, 135 S. Ct. at 1614 (citation omitted) (internal quotation marks omitted). The "critical question" regarding the tolerable duration of a traffic stop is whether the conduct "prolongs—*i.e.*, adds time to—the stop." *Id*. at 1616 (internal quotation marks omitted).

Although the majority declines to address whether the Rugby report necessarily resolved ordinary inquiries incident to the stop, I believe we should reach the issue. There is no question that examining a vehicle's VIN in the first place is an ordinary inquiry incident to a traffic stop. *See New York v. Class*, 475 U.S. 106, 115 (1986). The question is whether, after viewing the full, intact dashboard VIN and confirming that it matches a records check, it is still an ordinary inquiry incident to a traffic stop to seek out the doorjamb VIN in the interior of the vehicle.

It is not. In *Class*, the Supreme Court held that "the police officer's action does not violate the Fourth Amendment" where, in order to view the dashboard VIN, the officer "reach[es] into the passenger compartment of a vehicle to move papers obscuring the VIN." 475 U.S. at 107. The Supreme Court emphasized: "[O]ur holding today does not authorize police officers to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile. If the VIN is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it." *Id*. at 119. Here, not only was the VIN plate in plain view of someone outside the vehicle, it was also confirmed against the driver's records. There was no justification for Haskovic's intrusion into the vehicle.

At the suppression hearing, the government conceded that a "valid stop without any view that there's an issue that involves a VIN" does not allow a police officer to open the door to look for the VIN because, in the government's words, "it's diminished expectation of privacy, it's not no expectation of privacy whatsoever. So there has to be some basis." App'x at 540. That "there has to be some basis" undermines the government's ordinary-inquiry argument and highlights the key problem here: there was no basis to continue searching. I

would hold that where the dashboard VIN plate is readable from outside the vehicle, that VIN is confirmed (i.e., matches the registration and/or records check), and there is no indication the plate has been tampered with, an officer may not prolong the traffic stop for the purpose of further examining a VIN in the internal portion of the car.

The seven minutes the officers prolonged the stop was unconstitutional. *See Rodriguez*, 135 S. Ct. at 1614 (emphasizing the "critical question" of whether the conduct "adds time to" the traffic stop). This case embodies "how the authority to stop cars for minor traffic offenses . . . has burgeoned into a full-fledged crime-control strategy involving multiple patrol officers equipped with squad cars, guns, and lights." Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* 273 (2019). For Wallace, this burgeoning means that a defective brake light has cost him fifteen years of his life.

C. A Note on Credibility

I concur in the majority's discussion of the district court's factual findings. However, I write to note my concern with the district court's finding that Wallace knew the federal label was missing from the doorjamb, as is required under N.Y. Penal Law § 170.70. The district court made this finding for two

reasons: 1) Wallace's "deep knowledge of . . . VINS . . . and the law" evidenced in his briefing, and 2) Wallace's "acknowledge[ment] that he told officer Haskovic that [he] had previously seen car doors with stickers on them but did not know what happened to his." *Wallace*, 2016 WL 4367961, at *4.

As to the first reason, Wallace testified that he started learning about federal VIN stickers when he was incarcerated. *See* App'x at 463 (The court: "Tell me how you came to have such information about VINS . . ."; Wallace: "I started studying them when – I was using my time as I was incarcerated, you know, to study [them].") The district court found "this testimony unbelievable for numerous reasons, including defendant's general lack of credibility and defendant's high level of specific knowledge about VINs." *Wallace*, 2016 WL 4367961, at *4 n.10.

Wallace is imprisoned—and will be for a total of 15 years—for what arose from missing a federal VIN sticker on his doorjamb. It is eminently reasonable that a defendant in such circumstances would use his time incarcerated to research federal VIN stickers. *Cf. Faretta v. California*, 422 U.S. 806, 834 (1975) ("The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."). Wallace submitted ample

filings below and two well-researched briefs before this Court. It is disquieting that Wallace's diligence in his pro se briefing was used to penalize him and to ascribe retroactive knowledge to him.

As to the second reason the district court made its finding, for Wallace to have violated the law by knowingly possessing a vehicle missing the doorjamb VIN sticker, "[k]nowing possession means what it says: the person must know the vehicle is missing the VIN." *Cook v. Sheldon*, 41 F.3d 73, 78 (2d Cir. 1994). During oral argument at the sentencing hearing, defense counsel emphasized that a "sticker" is not the same thing as a "federal sticker" or VIN sticker. For example, vehicles have stickers on the doorjamb, as this one did, that include tire information. At the hearing, the district court twice acknowledged that under Section 170.70, it does not suffice for Wallace to know that stickers generally appear on the doorjamb of vehicles; rather, "he needs to know it's a VIN sticker that's been placed in a particular place." App'x at 519; *see also* App'x at 526.

Nevertheless, the district court concluded that Wallace's testimony that he did not know the federal VIN sticker was missing was "not credible" because Wallace "also acknowledged that he told officer Haskovic that [he] had previously seen *car doors with stickers* on them but did not know what happened

to his." *Wallace*, 2016 WL 4367961, at *4 (emphasis added) (citation omitted). Wallace's testimony and his "acknowledgement" are wholly consistent, and they do not support the conclusion that he knew the federal label was missing. Although we give strong deference to credibility determinations, *United States v. Murphy*, 703 F.3d 182, 189 (2d Cir. 2012), the reasons underlying the district court's credibility determination in this instance are deeply troubling.

CONCLUSION

In sum, where Wallace's dashboard VIN plate was readable from outside the vehicle, there was no indication the plate had been tampered with, and the VIN was confirmed against the Rugby results, the Rugby report dispelled any reasonable suspicion that the vehicle was stolen and fulfilled the recognized purposes of a traffic stop. The majority opinion allows an officer to extend a traffic stop for investigative purposes despite confirmation that the officer's suspicions are unfounded. I respectfully dissent.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 11, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	15 Cr. 794 (KBF)
	OPINION & ORDER
TIMMY WALLACE,	
Defendant.	

KATHERINE B. FORREST, United States District Judge:

Before the Court are numerous motions filed by defendant Timmy Wallace. Defendant moves primarily to suppress a firearm found subsequent to his arrest as well as statements made and DNA collected from defendant subsequent to his arrest. Defendant also moves to dismiss his Indictment and moves for immediate production of certain discovery material.

On May 25, 2015, NYPD officers pulled over defendant's vehicle for a defective brake light. During the stop, the officers searched the driver's side door of defendant's vehicle and discovered that the required federal label containing a vehicle identification number (VIN) was missing from the door. After discussing the missing label with defendant, defendant was arrested for violating New York Penal Law § 170.70, illegal possession of a vehicle identification number. A subsequent search of defendant's vehicle at the 44th precinct revealed a firearm located under the hood of defendant's vehicle. Defendant was then charged with, and indicted for,

a federal felon-in-possession charge pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §§ 922(g), 924(e)(1), 924(2)(A).

Defendant moves to suppress the evidence principally on the grounds that: 1) the stop of defendant's vehicle was improper because the police lacked reasonable, articulable suspicion or probable cause to believe that a traffic violation had occurred; 2) the initial search of defendant's vehicle conducted during the traffic stop, which resulted in discovery of the missing federal label, was unlawful; 3) the officers lacked probable cause to arrest defendant under N.Y. Penal Law §170.70 because defendant did not possess the requisite scienter at the time of his arrest; and 4) the search of defendant's vehicle conducted at the precinct subsequent to his arrest, which resulted in discovery of the firearm, was an unlawful "investigatory search." Defendant moves to dismiss the ACCA charge against him on the ground that one of the three prior convictions used to determine that defendant is a career offender no longer carries a maximum term of imprisonment of ten years or more.

The Court analyzes each of defendant's arguments separately – examining the legality of the car stop and initial search; the legality of defendant's arrest; and the legality of the search subsequent to defendant's arrest. For the reasons set forth below, the Court DENIES defendant's various motions in their entirety.

I. FACTUAL BACKGROUND

This motion has been vigorously litigated on both sides and the Court has reviewed briefing submitted by defendant's numerous counsel as well as the government's opposition. The court held an evidentiary hearing held on July 12, 2016 and August 1, 2016. Testimony was given by officers Harris Haskovic,

Michael Monahan, Alejandro Azcona, Sergeant Davon Alston, defendant Timmy Wallace, and others.

Overall, the Court finds the testimony given by NYPD officers Haskovic and Monahan to be generally credible and the testimony given by defendant to be generally not credible. Several portions of defendant's testimony make little sense. In addition, defendant's demeanor during the evidentiary hearing was unsupportive of someone who was being completely forthcoming. Defendant had a flat affect and showed little to no emotion when being questioned about the events in question. These general impressions of the Court influenced the specific factual findings detailed of the facts below. Only those facts necessary to provide context and resolution of this motion are set forth herein.

A. The Traffic Stop

On May 25, 2015, defendant was driving a black Dodge Magnum with New York license plate number GSA 1334. (See Government Exhibit "GX" 1.) Defendant was working as a pizza delivery worker, and his vehicle had a Papa John's pizza sign on top. (Jul. 12, 2016 Suppression Hr'g Tr. ("Jul. 12 Tr.") 30; Aug. 1, 2016 Suppression Hr'g Tr. ("Aug. 1 Tr.") 107.) There were two passengers seated in the backseat of defendant's vehicle. (Aug. 1 Tr. 138.) Defendant testified that the two individuals were not helping with defendant's deliveries, but rather were along for the ride. (Id.) Defendant could not recall the full name of either individual, but recalled only that they were friends of a friend. (Aug. 1 Tr. 108,

138.) The Court finds this scenario rather strange and believes that defendant was likely not forthcoming about his relationship with the passengers.[1]

At approximately 7:20 p.m., NYPD officers Haskovic and Monahan, as well as Sergeant Alston, were traveling in a patrol car behind defendant's vehicle. (Jul. 12 Tr. 30.) Officer Haskovic testified that the officers' vehicle was stopped in traffic approximately two to three feet away from defendant's vehicle at the corner of Webster Avenue and East 173rd Street. (Jul. 12 Tr. 25-27, 31.)

Officer Haskovic testified that when traffic started moving and then stopped again, defendant released and reapplied his brakes, such that officer Haskovic could see that only defendant's driver's side brake light was illuminated when defendant applied his brakes (i.e., the passenger's side brake light was not illumined when defendant stopped and was thus defective). (Id.) The court credits this testimony, which was corroborated by the testimony of officer Monahan, (Jul. 12 Tr. 145), and Sergeant Alston, (Aug. 1 Tr. 59.), which the Court also finds credible.[2] Furthermore, Sergeant Alston's memo book, prepared by Sergeant Alston on May 25, 2015, shortly after the incident, also included a notation about defendant's brake light. (GX 3503-3; see Aug. 1. Tr. 80). Defendant testified that he did not know whether his brake lights were or were not functioning on May 25, 2015. (Aug. 1 Tr. 140.) The officers ultimately pulled over defendant's vehicle on the

[1] The Court notes that besides weighing on defendant's credibility, this fact is ultimately irrelevant for this motion.

[2] The government presented a video of a test of the vehicle's defective brake light. (GX 16.) The video further corroborates the testimony of the officers that defendant's brake light was defective. The Court notes that the video is not alone conclusive, however, because the recording was made two months after the defendant's car was in the government's custody.

southbound side of Webster Avenue for the defective brake light. (Jul. 12 Tr. 26, 33.)[3]

B. Defendant's Arrest

After pulling defendant over for a defective break light, officers Haskovic and Monahan approached the driver's side of defendant's vehicle.[4] (Jul. 12 Tr. 33, 147.) They observed defendant in the driver's seat and the individuals in the backseat. (Jul. 12 Tr. 28, 146.) They also observed that the outside of defendant's driver side door had tool/scratch marks on the top right corner. (Jul. 12 Tr. 34, 148; GX 5.) Defendant concedes this point. (Aug. 1 Tr. 141) Both officers testified that these marks indicated to them that there may have been forcible entry into the vehicle. (Jul. 12 Tr. 35, 74, 148.) Officer Haskovic described the car's condition as poor: the windshield had broken glass and there were scratches and dents all over the car. (Jul. 12 Tr. 72-73) [5]

Upon the officers' request, defendant handed over his New York State driver's license but stated that he did not have a copy of his registration. (Jul. 12 Tr. 34.)[6] Defendant testified that he also provided a copy of his insurance card.

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[3] Officer Monahan was the officer driving the patrol vehicle. (Jul. 12. Tr. 161.) There was no dashboard or any other kind of video recording of this encounter. (Jul. 12 Tr. 69.)

[4] At the time, Sergeant Alston was inside the police vehicle having an unrelated telephone call with another officer. (Aug. 1 Tr. 61.)

[5] Officer Haskovic testified that the pizza delivery sign was returned to the business, Papa John's, the day after these events. (Jul. 12 Tr. 70-71.) Officer Haskovic testified that he observed a bag for carrying pizzas in the car, but no actual pizza boxes. (Jul. 12 Tr. 71.) He did not recall if there were any receipts in the car. (Jul. 12 Tr. 71-72.) Officer Monahan recalls seeing a pizza box in the car. (Jul. 12 Tr. 171.)

[6] Officer Haskovic testified that he was the one who asked defendant for his license and registration, but Officer Monahan also testified that he was the one who first approached defendant

(Aug. 1 Tr. 109.) Officer Haskovic testified that he did not recall defendant providing him with an insurance card for the car. (Jul. 12 Tr. 76.)[7] Defendant testified that he asked if he could search for the registration in his glove compartment, and that officer Haskovic said that was unnecessary as officer Haskovic could just look at the windshield. (Aug. 1 Tr. 135, 141.)

Officer Haskovic testified that he found defendant's inability to provide registration unusual, and looked towards the windshield of defendant's car for the car's registration sticker. (Jul. 12 Tr. 35.) Both he and officer Monahan observed that the registration sticker and the inspection sticker appeared to have been peeled off and taped back on to the car's windshield. (Jul. 12 Tr. 35-36, 148-49; GX 6, 7.) In addition, the surface of the stickers appeared abraded, and only 12 of the 17 digits of the VIN number printed on the registration sticker were legible. (Jul. 12 Tr. 36, 80, 149; GX 6, 7.)[8] The other legible components of the registration sticker included the vehicle's year (2005), model ("SUBN"), and only the first 5 of the 7 digits of the license plate. (Jul. 12 Tr. 79; GX 6.) Defendant testified that he had taped the stickers to the windshield with black tape, and then later replaced

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and requested his license. (Jul. 12 Tr. 34, 172.) Officer Monahan testified that both he and Haskovic asked defendant questions during the car stop. (Jul. 12 Tr. 150.)

[7] At the hearing, copies of the insurance card and registration were introduced into evidence. (Defendant's Exhibit "DX" C.) Defendant testified that the copies were obtained from the original documents that were in the glove compartment of his car and vouchered for release to his mother. (Aug. 1 Tr.at 132.)

[8] Both officers Haskovic and Monahan testified that they observed the public VIN on the dashboard of the vehicle, and that the digits on the public VIN matched the legible digits of the digits printed on the registration sticker. (Jul. 12 Tr. 81-83, 167; DX A.)

the black tape with clear tape. (Aug. 1 Tr. 143; GX 6.) Defendant testified that he was unaware that both stickers were self-adhesive and that he could apply them to the windshield without tape. (Aug. 1 Tr. 143.) Defendant also testified that the last time he had seen his registration and insurance stickers they were not in such poor condition. (Aug. 1 Tr. 142.)

Because he found the condition of the registration and insurance stickers to be unusual, officer Haskovic asked defendant why the stickers were in such poor condition. Defendant responded that he had previously sprayed ice defroster spray on the inside and outside of his windshield. (Aug. 1 Tr. 114-15.) Officer Haskovic testified that in his training and experience, he did not know of any defrosting agent that would cause such deterioration. (Jul. 12 Tr. 37-38, 84.) He also stated that he had never seen a registration sticker in this state before. (Jul. 12 Tr. 37.)

The court finds that defendant's testimony about the condition of his registration and insurance stickers on his car windshield not credible. As noted, defendant testified that he did not know the stickers were self-adhesive, but instead attempted had attached them with black tape and then later with clear tape. The court believes that defendant's explanation stretches credulity and common sense. As also noted, defendant testified that he sprayed ice defroster on both the inside and outside of his windshield, which caused the stickers to discolor. The Court finds it highly unlikely that anyone would use a defroster spray in such a manner; defendant's account is not credible. The Court also finds it highly unlikely that defendant was unaware of the poor condition of the registration and insurance

stickers. In addition, the Court does not credit defendant's testimony that officer Haskovic told defendant that officer Haskovic did not need Defendant's registration card because officer Haskovic could just look at Defendant's windshield. Based on his experience and credible testimony, the Court does not believe officer Haskovic would have found defendant's registration sticker on the windshield to be an adequate replacement for a registration card with defendant's information. The Court credits officer Haskovic and Monahan's testimony that the officers found the condition of the stickers — which were heavily effaced and appeared to have been peeled back and taped back on — to be suspicious.

Defendant further testified that at some point after officer Haskovic first approached him, Sergeant Alston approached defendant's car from the passenger side and, without permission, opened the passenger side door by reaching his hand through the window. (Aug. 1 Tr. 113.) Defendant testified that Sergeant Alston then opened the glove compartment over defendant's protest, stating that he wanted to check if defendant's registration was in the glove compartment. (Aug. 1 Tr. 112-13.) Defendant testified that in searching the glove compartment, Sergeant Alston's back was turned to the passengers in the vehicle. (Aug. 1 Tr. 145) Sergeant Alston, on the other hand, testified that he never opened the door and never searched in the glove compartment. (Aug. 1 Tr. 62.) He also explained that standard NYPD practice was to not to conduct a search of the interior of a vehicle while the occupants are still inside because it was unsafe to do so. (Aug. 1 Tr. 98.) The Court credits Sergeant Alston's testimony in this respect and finds that he did

not search defendant's glove compartment and would not have done so for safety reasons, particularly having to turn his back on the passengers.

At some point, officer Haskovic inquired as to the tool marks on the driver's side door of defendant's vehicle. Defendant stated that the marks were from when defendant had locked himself out of the vehicle. (Jul. 12 Tr. 38.) Next, officer Haskovic asked Defendant if defendant would allow the officer to open the driver's door to view the "federal label" or "federal sticker." (Jul. 12 Tr. 39.) Federal law, together with corresponding regulations, require that a label containing a vehicle's VIN be affixed next to the driver's seat on either "the hinge pillar, door-latch post, or the door edge that meets the door-latch post, next to the driver's seating position . . . ." See 49 U.S.C. § 32101; 49 C.F.R. § 567.4; see also (July. 12. Tr. 21, 142-43) The parties agree that the door was ultimately opened, but disagree as to how it became opened. Defendant testified that he did not give consent, but rather that officer Haskovic walked up to his door after taking defendant's license back to the patrol car and opened defendant's door without asking for permission. (Aug. 1. Tr. 119.) Officer Haskovic testified that defendant agreed to open the door. (Jul. 12 Tr. 39, 89-90.)[9] Officer Monahan testified that defendant gave permission to open the door, and that officer Monahan and officer Haskovic opened the door. (Jul. 12 Tr. 150-51.) The court credits the testimony of officers Haskovic and Monahan that Defendant did give consent to open the door.

[9] Officer Haskovic testified that he did not remember whether he or defendant ultimately opened the door. (Jul. 12. Tr. 39.)

It is also undisputed that defendant's driver side door was missing the federal label. (Jul. 12 Tr. 40, GX 8.) Officer Haskovic testified that defendant stated he knew the federal label had been on the door previously but did not know what had happened to it. (Jul. 12 Tr. 42, 91.) Officer Monahan recalled defendant stating that Defendant had purchased the car without the label. (Jul. 12 Tr. 152.) The Court finds this testimony from both officers to be credible. Defendant testified, in contrast, that prior to that conversation with officer Haskovic, defendant had no knowledge that the federal label was missing. (Aug. 1 Tr. 123) Defendant testified that he did not know what a federal sticker or federal label was, and that he did not know what officer Haskovic was referring to when he asked about the "sticker" that was missing from defendant's door. (Id.) The Court finds defendant's testimony to be not credible. In fact, the Court finds that defendant knew about federal stickers and knew that such stickers contained the car's VIN number. The Court reaches this conclusion based in part on the deep knowledge of cars, VINs, federal stickers, and the law that defendant has demonstrated throughout this case and in his numerous personally written filings.[10] (See, e.g., ECF No. 14) Defendant also acknowledged that he told officer Haskovic that defendant had previously seen car doors with stickers on them but did not know what happened to his. (Aug. 1 Tr. 123, 148.)

[10] Defendant testified that he only began learning about VINs and federal stickers in connection with this case. (Aug. 1 Tr. 125-26). The Court finds this testimony unbelievable for numerous reasons, including defendant's general lack of credibility and defendant's high level of specific knowledge about VINs demonstrated early in this case and in his multiple filings submitted to the Court. See, e.g., ECF No. 14.

After asking defendant about his federal sticker, officer Haskovic asked defendant to step out of his vehicle and placed defendant under arrest for violating New York Penal Law § 170.70. (Jul. 12 Tr. 42.) The arrest occurred at 7:29 p.m. (Jul. 12 Tr. 104.)[11] Sergeant Alston, the supervisor on scene, verified the arrest. (Jul. 12 Tr. 43-44.)[12] No further search of defendant's vehicle was conducted at the scene when defendant was arrested. (Jul. 12 Tr. 45, 152.) The other two passengers in defendant's car were released. (Jul. 12 Tr. 45.) Defendant was placed in officer Azcona's transport vehicle and taken to the 44th precinct. Officer Haskovic drove defendant's vehicle to the precinct. (Jul. 12 Tr. 45-46, 191.) It took approximately five minutes to travel to the precinct. (Jul. 12 Tr. 108.)

Defendant alleges that the officers had ulterior motives for stopping defendant's car. Such theory is speculative and unsupported by the evidence presented. According to audit records from the NYPD, one of the officers on the scene performed an electronic verification of defendant's name using a "Rugby device" at 7:22 p.m. (Aug. 1 Tr. 29; May 6, 2016 Ltr. from USA (ECF No. 49), at 1.) A Rugby device is a portable NYPD electronic device that allows officers to search law enforcement databases and programs. The information returned provided verification of defendant's driver's license information, vehicle type, and license

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[11] Officer Haskovic testified that he had made one prior arrest for violation of N.Y. Penal Law § 170.70 and that he had pulled over motorists for defective brake lights approximately thirty times. (Jul. 12 Tr. 27, 44.) Officer Monahan stated that he had participated in arrests for § 170.70 two times previously. (Jul. 12 Tr. 182.)

[12] Sergeant Alston testified that he did not remember if he saw the car door with the missing sticker but that it was not his practice to verify each piece of information relating to an arrest while acting as supervisor. (Aug. 1. Tr. 56.)

plate; the verification also yielded a VIN number that matched the full public VIN on the dashboard of defendant's car and the partial VIN visible on the registration sticker. (Aug. 1 Tr. 38; DX B-1)

It is not clear who performed the verification. At some point during the stop, officer Azcona, who was patrolling in a separate vehicle, arrived at the scene. According to officer Azcona, he happened to see officers Haskovic and Monahan and Sergeant Alston with defendant's stopped car and offered his assistance unprompted.[13] (Jul. 12 Tr. 189, 193.) Officer Azcona had a Rugby device, and lent the device to the officers on the scene, who did not have such a device and whose vehicle did not have a working computer. (Jul. 12 Tr. 44-45, 67-68, 189-90.)[14] Officer Azcona was already logged into the device when he handed it to officer Haskovic. (Jul. 12 Tr. 197.) However, officer Haskovic did not remember anyone, including himself, running the defendant's information through the Rugby device prior to arresting defendant. (Jul. 12 Tr. 63-64, 70, 86-89.)[15] Sergeant Alston testified that he did not use the Rugby device and that he did not recall if anyone ran the Rugby device. (Aug. 1 Tr. 80.) Defendant also did not recall seeing anyone using the device. (Aug. 1 Tr. 118.)

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[13] Officer Monahan did not recall any other police personnel coming to assist with the stop. (Jul. 12 Tr. 162.) He did not recall whether they had a Rugby unit or whether defendant's information was run through it or not. (Jul. 12 Tr. 164-66.)

[14] Officer Azcona testified that officer Haskovic asked to use the Rugby device. (Jul. 12 Tr. 194.) He also testified that officer Haskovic gave him the Rugby device back at the precinct. (Jul. 12 Tr. 199.)

[15] Officer Aczona testified he did not know whether officer Haskovic actually used the device. (Jul. 12 Tr. 196.)

Importantly, officer Haskovic testified that even if an on-site verification of defendant's license plate and public VIN number produced matching results, officer Haskovic's concerns about defendant's vehicle would not necessarily have been alleviated. (Jul. 12 Tr. 64.)[16] Officer Haskovic testified that he was concerned that defendant's car could have been subject to a "VIN swap." (Jul. 12 Tr. 64.) To effect a VIN swap, an individual removes the VIN number from a damaged vehicle and places the number onto a stolen vehicle of a similar make and model in order to mask the stolen nature of the vehicle. (Jul. 12 Tr. 23, 64-66.) Officer Haskovic testified that he acquired knowledge about "VIN swap" schemes in his NYPD training on automobile crimes. (Jul. 12 Tr. 66.)[17] The Court credits officer Haskovic's testimony and does not believe that the officers had any ulterior motive when they pulled over defendant's vehicle.

C. The Car Search Subsequent to Defendant's Arrest

Subsequent to defendant's arrest, officer Haskovic vouchered defendant's vehicle. (Jul. 12 Tr. 46-48; GX 12.) He indicated on the vehicle voucher that the vehicle was "arrest evidence," because the vehicle itself was evidence for the N.Y. Penal Code § 170.70 violation. (Jul. 12 Tr. 48, 153.)

Officer Haskovic and officer Monahan also performed an inventory search of defendant's vehicle.[18] (Jul. 12 Tr. 48, 52, 153.) Both officers testified that they had

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[16] It is possible to run a partial VIN number through the NYPD databases. (Jul. 12 Tr. 85-86.)

[17] Officer Haskovic testified that he had never personally seen a vehicle that had a VIN swap. (Jul. 12 Tr. 66.)

[18] Although officer Haskovic did not use the term "inventory search" in his grand jury testimony on May 28, 2015, no questions regarding "inventory searches" were posed to him. At

been trained to perform such a search, which is routine procedure and allows the NYPD to account of property that must be safeguarded. (Jul. 12 Tr. 49-50, 154; see GX 15) Officer Haskovic testified that he began the inventory search of defendant's vehicle by checking the driver's seat area. (Jul. 12 Tr. 52, 108, 110.) At that time, officer Monahan was searching the interior rear of the vehicle. (Jul. 12 Tr. 52, 155.) officer Haskovic testified — and the Court credits — that officer Haskovic had two purposes when he then proceeded to check under the hood of defendant's vehicle: to continue the inventory search and to conduct an investigatory search of the confidential VIN number that should have been engraved on the engine block or transmission. (Jul. 12 Tr. 52-54, 94-95.) Officer Haskovic testified that he wanted to cross check the public VIN of the vehicle, which is on the dashboard of the car, against the engraved confidential VIN. (Jul. 12 Tr. 54.) The Court finds that officer Haskovic was clear and forthcoming about the purposes of his search.

At approximately 7:40 p.m., officer Haskovic opened the hood of defendant's car. (Jul. 12 Tr. 107) Officer Haskovic immediately noticed a black grocery bag hanging behind the passenger side headlight. (Id.) Officer Haskovic lifted the grocery bag and uncovered a black nylon zipper bag inside. (Jul. 12 Tr. 55-56; GX 10.) He unzipped the nylon bag and saw the butt of a handgun. (Jul. 12 Tr. 55.) Officer Haskovic then placed the bag back inside the car and called officer Monahan and his sergeant over. (Jul. 12 Tr. 55-57, 156.) Officer Haskovic then notified the

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defendant's parole revocation hearing on June 15, 2015, officer Haskovic referenced conducting an inventory search of defendant's vehicle. (Jul. 12 Tr. 118-121.)

evidence collection team and halted the inventory process until they arrived. (Jul. 12 Tr. 55, 110.)

Officer Haskovic testified that after the evidence collection team left, he continued to complete the inventory search of defendant's vehicle, which yielded a number of objects such as a tee shirt, a flashlight, and wires. (Jul. 12 Tr. 60-61, 110.) He vouchered the firearm first. (Jul. 12 Tr. 111-12.) The remaining property found in the vehicle was vouchered later on by officer Haskovic; officer Monahan was not involved in the later process. (Jul. 12 Tr. 110-156, 181.)[19]

II. STANDARD OF REVIEW

"It 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). "The movant can shift the burden of persuasion to the government and require it to justify its search, however, when the search was conducted without a warrant." Id. A warrantless search is presumptively unreasonable and "subject only to a few specifically established and well-delineated exceptions." United States v. Kiyuyung, 171 F.3d 78, 83 (2d Cir. 1999). At a suppression hearing, the burden must be met by "no greater burden than proof by a preponderance of the evidence." United States v. Matlock, 415 U.S. 164, 178 (1974).

[19] Officer Haskovic also testified that he ran the public VIN number of defendant's vehicle at the stationhouse. (Jul. 12 Tr. 63.) There is no evidence that any information associated with the car did not match that which was registered to defendant.

III. DISCUSSION

"The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" Davis v. United States, 564 U.S. 229, 236 (2011). If the Court finds that a search or seizure violated the Fourth Amendment, the next step is to determine whether the evidence obtained as a result of that illegal search or seizure ought to be suppressed pursuant to the exclusionary rule. The exclusionary rule is "a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." Davis, 564 U.S. at 231–32; see also Mapp v. Ohio, 367 U.S. 643 (1961). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'" Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (quoting Segura v. United States, 468 U.S. 796, 804 (1984)). Because the exclusionary rule is a "prudential" doctrine, see Davis, 564 U.S. at 236, it is "applicable only . . . where its deterrence benefits outweigh its substantial social costs," as "suppression of evidence . . . has always been our last resort, not our first impulse," Strieff, 136 S. Ct. at 2061 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). Because defendant challenges various aspects of the officers' conduct that resulted in the ultimate discovery of the firearm in defendant's vehicle, the Court discusses the legal principles associated with each issue.

A. The Traffic Stop and Initial Search of Defendant's Vehicle

Defendant first challenges the legality of the traffic stop and initial search of his vehicle during such stop. "The temporary detention of an individual during a traffic stop is subject to limitation under the Fourth Amendment as a 'seizure' of the person." Holeman v. City of New London, 425 F.3d 184, 189 (2d Cir. 2005) (citing Whren v. United States, 517 U.S. 806, 809–10 (1996)). The "Fourth Amendment requires that an officer making [a traffic] stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." Id. at 189 (2d Cir. 2005); see also United States v. Jenkins, 452 F.3d 207, 212 (2006); United States v. Gomez, 2016 WL 4083427, at *8 (S.D.N.Y. July 29, 2016). "Whether probable cause or reasonable suspicion exists is an objective inquiry; the 'actual motivations of the individual officers involved' in the stop 'play no role' in the analysis." Holeman, 425 F.3d at 190 (quoting Whren, 517 U.S. at 813).

As discussed above, based on the credible testimony of officer Haskovic, which was corroborated by the credible testimony of officer Monahan and Sergeant Alston, as well as a video, the Court finds that on May 25, 2015, defendant was operating his vehicle with a defective brake light and that the officers stopped defendant's vehicle because of his defective brake light. Defendant does not contest that driving with a defective brake light is a traffic violation. The Court therefore concludes that the officers' stop of defendant's vehicle was justified by reasonable suspicion. While defendant argues that he was stopped not for the defective brake light but rather because of the officers' subjective motivation to search Defendant's

car for contraband, such motivation — even if true — does not defeat the legality of the stop. United States v. Dhinsa, 171 F.3d 721, 725-26 (2d Cir. 1999).

B. Defendant's Arrest

Defendant next challenges his arrest. The legality of defendant's arrest — which led to the subsequent search of his car at the precinct — turns on probable cause. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). Probable cause exists if "the law enforcement official, on the basis of the totality of the circumstances, has sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing that an offense has been or is being committed by the person to be arrested." United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990). As the Supreme Court has noted, "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232, (1983). An officer is "is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." Martinez v. Simonetti, 202 F.3d 625, 635-36 (2d Cir. 2000).

Defendant was arrested pursuant to N.Y. Penal Law §170.70, which provides:

A person is guilty of illegal possession of a vehicle identification number when:

> (1) He knowingly possesses a vehicle identification number label, sticker or plate which has been removed from the vehicle or vehicle part to which such label, sticker or plate was affixed by the manufacturer in accordance with 49 U.S.C. section 32101, et seq. and regulations promulgated thereunder or in accordance with the provisions of the vehicle and traffic law; or
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> (2) He knowingly possesses a vehicle or vehicle part to which is attached a vehicle identification number label, sticker or plate or on which is stamped or embossed a vehicle identification number which has been destroyed, covered, defaced, altered or otherwise changed, or a vehicle or vehicle part from which a vehicle identification number label, sticker or plate has been removed, which label, sticker or plate was affixed in accordance with 49 U.S.C. section 32101, et seq. or regulations promulgated thereunder, except when he has complied with the provisions of the vehicle and traffic law and regulations promulgated thereunder; . . . .

N.Y. Penal Law § 170.70. Defendant does not dispute that the federal label was indeed missing from the driver's side door of his vehicle.

Instead, defendant first contends that that a missing federal label cannot constitute a violation of § 170.70. This argument is contradicted by the plain text of Section 170.70. That section criminalizes knowing possession of a "vehicle part from which a vehicle identification label, sticker or plate has been removed, which label sticker, or plate was affixed in accordance with 49 U.S.C. section 32101, et seq., or regulations promulgated thereunder." N.Y. Penal Code § 170.70(2). And 49 U.S.C. Section 32101, together with corresponding regulations, require that the federal label, which contains the VIN, be affixed next to the driver's seat on either "the hinge pillar, door-latch post, or the door edge that meets the door-latch post, next to the driver's seating position . . . ." See 49 C.F.R. § 567.4. The case law cited by defendant in support of his position concerned a prior version of Section 170.70

that contained different language from the current statute. See, e.g., People v. Sullivan, 137 Misc. 2d 909 (N.Y. Sup. Ct. 1987).

Defendant next argues that the officers illegally opened defendant's driver side door and that the officers lacked probable cause to believe that defendant's vehicle was stolen or that defendant had violated N.Y. Penal Law § 170.70. The Court concludes that the opening of defendant's driver side door was a legal search, and that the officers had probable cause to believe that defendant had violated Section 170.70. It is irrelevant whether the officers had probable cause to believe that defendant's vehicle was stolen.

As previously noted, the court credits officer Haskovic's testimony, corroborated by officer Monahan's testimony, that defendant gave consent to open the door. "It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); see also Gomez, 2016 WL 4083427, at *11. During the suppression hearing held on August 1, 2016, counsel for defendant argued for the first time that any consent given by defendant was not knowing and voluntary. (Aug. 1 Tr. 234).

"The government has the burden of proving, by a preponderance of the evidence, that a consent to search was voluntary." United States v. Calvente, 722 F.2d 1019, 1023 (2d Cir. 1983). The Court finds that the government has met this burden. "Voluntariness is a question of fact determined by a 'totality of all the circumstances.'" Gomez, 2016 WL 4083427, at *1 (quoting Schneckloth, 412 U.S. at

227). "The ultimate question presented is whether the officer had a reasonable basis for believing that there had been consent to the search." Id. (quoting United States v. Garcia, 56 F.3d 418, 423 (2d Cir. 1995)). Defendant is fluent in English and has had prior interactions with the police. In fact, defendant testified during the suppression hearing that he knew the police were prohibited from unilaterally searching his car. (Aug. 1 Tr. 113). There is no indication that the officers pressured or coerced defendant in any manner. Considering all of the evidence presented, it was objectively reasonable for the officers to believe that defendant had given informed consent for the officers to open defendant's door.

As detailed in the Factual Background, supra, once officer Haskovic discovered that defendant's driver-side door was missing the federal label containing the VIN number, officer Haskovic confirmed that defendant knew the federal label was missing. (Jul. 12 Tr. 42, 91.) Defendant also told officer Monahan that defendant purchased the car without the federal label. (Jul. 12 Tr. 152.) At this point, the officers had probable cause to arrest defendant for a Section 170.70 violation because defendant "knowingly possessed a . . . vehicle part from which a vehicle identification label, sticker or plate has been removed, which label sticker, or plate was affixed in accordance with 49 U.S.C. section 32101, et seq., or regulations promulgated thereunder." N.Y. Penal Code § 170.70(2). The government has demonstrated that defendant had the required scienter at the time of his arrest. "Knowing possession means what it says: the person must know the vehicle is missing the VIN." Cook v. Sheldon, 41 F.3d 73, 78 (2d Cir. 1994).

C. The Car Search Subsequent to Defendant's Arrest

Defendant challenges the legality of the car search conducted at the precinct subsequent to his arrest, which resulted in the discovery of a firearm in defendant's vehicle. "It is well recognized in Supreme Court precedent that, when law enforcement officials take a vehicle into custody, they may search the vehicle and make an inventory of its contents without need for a search warrant and without regard to whether there is probable cause to suspect that the vehicle contains contraband or evidence of criminal conduct." United States v. Lopez, 547 F.3d 364 (2d Cir. 2008) (citing Illinois v. Lafayette, 462 U.S. 640, 643 (1983)). "An inventory search pursuant to standardized procedures will be upheld unless there is a showing that the government acted in bad faith or searched the car for the sole purpose of investigation." United States v. Arango-Correa, 851 F.2d 54, 59 (2d Cir. 1988). Importantly, under the inventory search doctrine, "law enforcement officials may open closed containers as part of an inventory search so long as they act in good faith pursuant to standardized criteria . . . or established routine." United States v. Mendez, 315 F.3d 132, 137 (2d Cir. 2002). "The existence of such a valid procedure may be proven by reference to either written rules and regulations, or testimony regarding standard practices." Id. But "[t]he Fourth Amendment does not permit police officers to disguise warrantless, investigative searches as inventory searches." United States v. Lopez, 547 F.3d 364, 372 (2d Cir. 2008). Defendant claims that the search was not an inventory search but rather an unlawful "investigatory search."

The Court rejects defendant's argument. As already established, officers Haskovic and Monahan credibly testified that they performed an inventory search of defendant's vehicle. (Jul. 12 Tr. 48, 52, 153.) During the suppression hearing, the government presented evidence identifying standard procedures of the NYPD pertaining to automobile inventory searches. (See Jul. 12 Tr. 49-50, 154; GX. 17). These procedures instruct officers to thoroughly search the interior of a vehicle, including under the hood, and permit officers to open closed containers. Id. Officer Haskovic credibly testified that he had received training on how to conduct an inventory search and had been following the NYPD standard procedures regarding inventory searches when he searched defendant's vehicle. (Jul. 12 Tr. 47) The Court concludes that the inventory search of defendant's vehicle was proper.

It is true that office Haskovic also testified that he was also conducting a further investigation of defendant's vehicle to attempt to locate one of the vehicle's confidential VINs. (Jul. 12 Tr. 49, 94) But "[a]n otherwise-reasonable inventory search will not be rendered unreasonable merely because an officer is motivated in part by investigatory purposes or by the expectation that the search will yield evidence." Bryant v. Vill. of Greenwood Lake, 2013 WL 5952610, at *4 (S.D.N.Y. Nov. 6, 2013), aff'd sub nom. Bryant v. Dasilva, 582 F. App'x 56 (2d Cir. 2014). The subjective investigatory motivation of an officer does not normally defeat the legality of an otherwise proper inventory search. "When officers, following standardized inventory procedures, seize, impound, and search a car in circumstances that suggest a probability of discovering criminal evidence, the

officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes." Lopez, 547 F.3d 364, 372 (2d Cir. 2008). The Court finds that the legality of the otherwise reasonable inventory search conducted by officers Haskovic and Monahan was not altered by any investigatory motive the officers may have possessed.

Even if the Court determined that officer Haskovic had an impermissible investigatory motive while conducting the search of defendant's vehicle that led to the discovery of the firearm, evidence of the firearm would not be surpassed because it would have been inevitably discovered. "Under the inevitable discovery doctrine, evidence that is illegally obtained will not be suppressed if the government can prove that the evidence would have been obtained inevitably even if there had been no statutory or constitutional violation." Mendez, 315 F.3d at 137. In the inventory search context, the inevitable discovery doctrine allows for the admission of otherwise impermissibly obtained evidence where the government proves: "(1) that the police had legitimate custody of the vehicle or other property being searched, so that an inventory search would have been justified; (2) that when the police in the police agency in question conducted inventory searches, they did so pursuant to 'established' or 'standardized' procedures, and (3) that those inventory procedures would have 'inevitably' led to the 'discovery' of the challenged evidence." Id. (citations omitted); see also United States v. Cancel, 2016 WL 929340, at *7-10 (S.D.N.Y. Mar. 9, 2016).

Here, it has already been established that the officers had legitimate custody of Defendant's vehicle after defendant was arrested. It has also been established that the NYPD conducts inventory searches pursuant to standard procedures, and that officer Monahan, in addition to officer Haskovic, was engaging in an inventory search of defendant's vehicle. Lastly, such procures would have inevitably led to the discovery of the black bag located behind defendant's head light, as well as the firearm inside such bag. This is true regardless of any investigatory motives officer Haskovic may have had.

The Court also notes that because defendant's arrest and the subsequent search under the hood of defendant's vehicle were lawful, defendant's fleeting arguments that his statements and DNA must be suppressed are without merit.

D. The ACCA

Defendant also argues that he should not have been indicted pursuant to the Armed Career Criminal Act ("ACCA"). See 18 U.S.C. § 924(e). For the reasons set forth below, the Court rejects this argument.

The ACCA mandates that individuals who are convicted of violating 18 U.S.C. § 922(g) and who "ha[ve] three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different form one another," be sentenced to at least fifteen years' imprisonment. Id. § 924(e)(1). A prior state controlled substance conviction is considered a "serious drug offense" under the statute if "a maximum term of imprisonment of ten years or more is prescribed by law" for the offense." Id. § 924(e)(2)(A)(ii).

Here, defendant's ACCA Indictment was based on defendant's instant felon-in-possession charge pursuant to 18 U.S.C. § 922(g) and three previous convictions for serious drug offenses. See 18 U.S.C. § 924(e). Specifically, defendant had the following three prior convictions under New York law:

1) On January 20, 2010, criminal sale of controlled substance in the 2nd degree, a Class A-II felony, in violation of New York Penal Law § 220.41(1);

2) On June 12, 2001, criminal sale of controlled substance in the 3rd degree, a Class B felony, in violation of New York Penal Law § 220.39(1); and

3) On April 15, 1999, criminal sale of controlled substance in the 3rd degree, a Class C felony, in violation of New York Penal Law § 220.39(1).

Nevertheless, defendant argues that the ACCA charge should be dismissed because his 2001 conviction no longer qualifies as a serious drug offense following the Drug Reform Law Act of 2009 ("DRLA"), which reduced the maximum penalty for class B drug felonies from 25 years to 9 years and provided for resentencing of previously convicted offenders under certain circumstances. See N.Y. Penal Law § 70.70(2)(a)(i); N.Y. Crim. Proc. Law § 440.46(1).[20]

In McNeil v. United States, 563 U.S. 816 (2011), the Supreme Court explained that in determining whether a prior conviction qualifies as a "serious drug offense," the Court must "consult the maximum sentence applicable to a

[20] Defendant is not eligible for resentencing under the DLRA because he is not currently serving a sentence in New York State custody. And Although the DRLA also lowered the maximum sentence for Class C felonies such as defendants 1999 conviction from 15 years to 5 and a half years, the reduction was not retroactive and only applied to offenses committed after the passage of the DRLA in 2004.

defendant's previous drug offense at the time of his conviction for the offense." Id. at 820 (2011). However, the McNeil Court noted that it was not addressing "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." Id. at 825 n.1; see also United States v. Jackson, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013). Relying on McNeil, defendant argues that because the DLRA lowered the maximum sentence for class B drug felonies to 9 years, the Indictment should be dismissed.

The Court disagrees. Even after the passage of the DLRA, defendant would still be facing a maximum term of imprisonment of twelve years for his 2001 conviction. Such conviction was defendant's second felony drug conviction.[21] The current authorized maximum sentence for a second felony drug offender "shall not exceed twelve years" where the offense at issue is a class B felony, such as defendant's. N.Y. Penal Law § 70.70(3)(b)(i); see also People v. Bennett, 911 N.Y.S.2d 694 (N.Y. County Ct. 2010). Therefore, even after the DLRA, defendant would be facing a maximum sentence that exceeds 10 years and such conviction qualifies as a serious drug offense under the ACCA.

E. Defendant's Discovery Demands

The discovery available in a criminal matter is governed by the Federal Rules of Criminal Procedure, several key cases including Brady v. Maryland, 373 U.S. 83,

[21] New York Penal Law § 70.70(1)(b) defines "Second felony drug offender" as a "second felony offender . . . who stands convicted of any felony, defined in article two hundred twenty or two hundred twenty-one of this chapter other than a class A felony." Defendant's 1999 Conviction is for a class C felony defined in article 220 of the New York Penal Code.

(1963) and Giglio v. United States, 405 U.S. 150 (1972), and the "Mencks Act," 18 U.S.C. § 3500.

Rule 16 of the Federal Rules of Criminal Procedure provides, in pertinent part, that a defendant is entitled to obtain from the government documents and objects that are "within the government's possession, custody, or control" if they are "material to preparing the defense" or will be used by the government in its case-in-chief at trial. Fed. R. Crim. P. 16(a)(1)(E).

Evidence that the government does not intend to use in its case-in-chief at trial is material "if it could be used to counter the government's case or to bolster a defense; information not meeting either of those criteria is not to be deemed material within the meaning of the Rule." United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993). Rule 16(a) is not — and never was — "intended to provide the defendant with access to the entirety of the government's case against him." United States v. Percevault, 490 F.2d 126, 130 (2d Cir. 1974) (citation omitted). "Discovery of evidence in criminal prosecutions is, inevitably, more restricted than discovery in civil cases." United States v. Tolliver, 569 F.2d 724, 728 (2d Cir. 1978). Rule 16 "does not entitle a criminal defendant to a 'broad and blind fishing expedition among [items] possessed by the Government on the chance that something impeaching might turn up.'" United States v. Larranga Lopez, No. 05 Cr. 655 (SLT), 2006 WL 1307963, at *8 (E.D.N.Y. May 11, 2006) (alteration in original) (citing Jencks v. United States, 353 U.S. 657, 667 (1957)).

The Jencks Act provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). The plain meaning of this provision does not require production of 3500 material before trial. In practice, however, courts in this district require the government to produce 3500 material at least the Friday prior to the commencement of trial and sometimes earlier.

The Jencks Act is intended to provide the defense with prior statements of government witnesses for purposes of impeachment. United States v. Carneglia, 403 F. App'x 581, 586 (2d Cir. 2010). The Jencks Act is not a general discovery device. See United States v. Exolon-Esk Co., No. 94-CR-17S, 1995 WL 46719, at *2 (W.D.N.Y. Jan. 19, 1995) (citing In re United States, 834 F.2d 283, 286 n.2 (2d Cir. 1987)); see also United States v. Jackson, 345 F.3d 59, 76 (2d Cir. 2003) (The Jencks Act "does not normally mandate disclosure of statements made by a person who does not testify." (citations omitted)).

"There is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977); see also Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) ("Defense counsel has no constitutional right to conduct his own search of the [Government's] files to argue relevance." (citation omitted)); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969) ("Neither [Brady] nor any other case requires the government to afford a

criminal defendant a general right of discovery."); United State v. Meregildo, 920 F. Supp. 2d 434, 440 (S.D.N.Y. 2013) ("Brady is not a rule of discovery—it is a remedial rule." (citing United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001))). Rather, Brady established that the government has a constitutional obligation to disclose favorable and material information to the defendant. See Brady v. Maryland, 373 U.S. 83, 87 (1963).

"Brady material that is not 'disclosed in sufficient time to afford the defense an opportunity for use' may be deemed suppressed within the meaning of the Brady doctrine." United States v. Douglas, 525 F.3d 225, 245 (2d Cir. 2008) (alteration omitted) (quoting Leka v. Portuondo, 257 F.3d 89, 103 (2d Cir. 2001)); see also Coppa, 267 F.3d at 135 ("Brady material must be disclosed in time for its effective use at trial." (citation omitted)). Brady material buried within significant amounts of 3500 material and provided too close to trial to permit effective use may — under certain circumstances — also be deemed suppressed. See Douglas, 525 F.3d at 245; see also United States v. Rittweger, 524 F.3d 171, 181 n.4 (2d Cir. 2008) ("Complying with the Jencks Act . . . does not shield the government from its independent obligation to timely produce exculpatory material under Brady . . . .").

Defendant moves for an order directing the government to produce Brady and Giglio materials, certain witness statements, as well as evidence under Fed. R. Evid. 404(b). (Def's Memo. of Law in Support of Def's Supplemental Motions, ECF Nos. 60, 61, 62, at 12-15.) Defendant's motion requests discovery of 13 broad categories of documents and information including, generally: (1) police reports and

notes indicating that the stop of defendant occurred based on knowledge that law enforcement had prior to the stop; (2) police radio run recordings, transcript of radio run recordings relates to the stop; (3) police notes and interviews done subsequent to defendant's arrest; (4) prior inconsistent statements including attorney proffers; and (5) statements or reports reflecting witness statement variations. Defendant also moves for immediate production of all other Brady and Giglio material.

The 13 discovery requests cast a broad net. The net is broader than that which the rules allow without particular rationale. No such rationale has been provided. In light of the absence of rationale, the Court does not find it necessary to discuss the requests on an individual basis. Instead, it states certain propositions generally applicable to its determination.

First, the government has Brady obligations with which it must comply. The government has stated that it is aware of those obligations — and the Court finds no basis to believe that it has not met them or will not continue to meet them. As set forth in the discussion of the law, Brady is not a general discovery device and cannot justify the discovery sought herein.

Second, the government also has Giglio and Jencks Act obligations. It is aware of those obligations, and the Court has no reason to doubt that it will comply with them at the appropriate time and in accordance with the Court's order dated August 2, 2016 (ECF No. 88) — sufficiently in advance of trial so as to give defense counsel adequate time to prepare for cross-examination of government witnesses. Defendant's demand that Giglio and 3500 material be provided at this pre-trial

stage is premature. No particular rationale has been presented which would justify such an unusually early production.

Third, defendant is entitled to certain discovery pursuant to Rule 16. The government has represented that it has complied with its Rule 16 obligations. In particular, the government has already provided the defendant with a copy of a video brake light test that was conducted on defendant's vehicle. The government has also represented that pursuant to Federal Rule of Evidence 404(b)(2), it will provide reasonable notice of any evidence it plans to offer under Rule 404(b) prior to trial and in accordance with the Court's schedule.

IV. CONCLUSION

For these reasons, defendant's motions are DENIED in their entirety.

SO ORDERED:

Dated: New York, New York
August 11, 2016

KATHERINE B. FORREST
United States District Judge

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED NOVEMBER 19, 2019

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand nineteen.

United States of America,

Appellee,

v.

Timmy Wallace,

Defendant - Appellant.

ORDER

Docket No: 17-472

Appellant, Timmy Wallace, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk