APPENDIX

Appendix A

S.D.N.Y. – N.Y.C.
19-cv-3623
12-cr-802
Furman, J.

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 29th day of December, two thousand twenty-one.

Present:

Susan L. Carney,
Joseph F. Bianco,
*Circuit Judges.**

David Delva,

Petitioner-Appellant,

v. 20-4253

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, appointment of counsel, and to stay the appeal. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

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*Chief Judge Debra Ann Livingston has recused herself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

Appendix B

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 3rd day of May, two thousand twenty-two.

David Delva,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

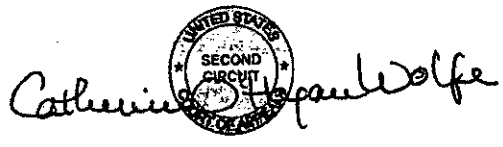
ORDER

Docket No: 20-4253

Appellant, David Delva, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX-C

UNITED STATES OF AMERICA, Appellee, - v. - DAVID DELVA, a/k/a Sealed Defendant 4, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
858 F.3d 135; 2017 U.S. App. LEXIS 9645
Docket No. 15-683
June 1, 2017, Decided
May 20, 2016, Argued

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Delva v. United States, 2018 U.S. LEXIS 1735 (U.S., Mar. 19, 2018)

Editorial Information: Prior History

Appeal from a judgment of the United States District Court for the Southern District of New York, Katherine B. Forrest, Judge, convicting defendant of conspiracies to commit kidnapping and robbery, see 18 U.S.C. §§ 1201 and 1951; conspiracy to distribute narcotics, see 21 U.S.C. § 846; and substantive firearms offenses, see 18 U.S.C. §§ 924(c) and 922(g). Defendant principally challenges the district court's ruling that law enforcement agents' seizure of his cellular telephone and of letters belonging to his uncle from the bedroom shared by defendant and his uncle, following the arrest of the uncle in the apartment in connection with the kidnapping and robbery, pursuant to an arrest warrant but without a search warrant, did not violate the Fourth Amendment because those items were in plain view and were seized during a protective sweep of the apartment. Although the record shows that those items were in fact seized after the protective sweep had been completed and the agents had left and reentered the bedroom, the district court's findings that the items were in plain view in that room and were recognizable as evidence are not clearly erroneous; and we conclude that the agents' warrantless reentry into that room did not violate the Fourth Amendment**{2017 U.S. App. LEXIS 1}** because it was justified**{2017 U.S. App. LEXIS 2}** by the exigencies of the circumstances, given that the agents had found four adult males in the small apartment and had seen narcotics and a gun during the protective sweep, and that that bedroom was the only unoccupied room, other than the bathroom, in which to question, individually, the arrestee and the others in order to determine whom to arrest for possession of the narcotics and gun.United States v. Delva, 2014 U.S. Dist. LEXIS 126370 (S.D.N.Y., Sept. 9, 2014)United States v. Delva, 13 F. Supp. 3d 269, 2014 U.S. Dist. LEXIS 36845 (S.D.N.Y., Mar. 11, 2014)

Disposition:

Affirmed.

Counsel For Appellee: JUSTINA GERACI, Assistant United States Attorney, New York, New York (Preet Bharara, United States Attorney for the Southern District of New York, Margaret Garnett, Assistant United States Attorney, New York, New York, on the brief).
For Defendant-Appellant: STEVEN Y. YUROWITZ, New York, New York.

Judges: Before: KEARSE, WINTER, and JACOBS, Circuit Judges. DENNIS JACOBS, Circuit Judge, dissenting.

CASE SUMMARY Agents' warrantless reentry into bedroom did not violate Fourth Amendment as it was justified by exigencies of circumstances, given that agents found four adult males in small apartment and saw narcotics and gun during protective sweep, and that bedroom was only unoccupied room in which to

question arrestee and others to determine whom to arrest.

OVERVIEW: HOLDINGS: [1]-The agents' warrantless reentry into a bedroom shared by defendant and his uncle did not violate the Fourth Amendment because it was justified by the exigencies of the circumstances, given that the agents had found four adult males in the small apartment and had seen narcotics and a gun during the protective sweep, and that the bedroom was the only unoccupied room, other than the bathroom, in which to question, individually, the arrestee and the others in order to determine whom to arrest for possession of the narcotics and gun; [2]-The district court did not abuse its discretion in permitting the victim to testify that during the kidnapping/robbery she was raped because her testimony was directly relevant to the manner in which the robbery succeeded; [3]-Trial counsel's strategic decision not to cross-examine the victim did not constitute ineffective assistance of counsel.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Plain View
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances

The Fourth Amendment to the Constitution provides that 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. U.S. Const. amend. IV. It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. Thus, generally, as a basic principle of Fourth Amendment law, entries into a home without a warrant, or searches and seizures inside a home without a warrant, are presumptively unreasonable. However, this presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness. Accordingly, the warrant requirement is subject to certain reasonable exceptions. The few, specifically established, and well-delineated exceptions, include security-based limited searches in conjunction with an in-home arrest pursuant to an arrest warrant, entries into a home in exigent circumstances, and seizures by the officers of any evidence that is in plain view during the course of their legitimate emergency activities.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
Criminal Law & Procedure > Search & Seizure > Warrantless Searches

As a procedural matter, a defendant seeking suppression of evidence found without a search warrant must show that he had a reasonable expectation of privacy in the place or object searched. If such a privacy interest is established, the government has the burden of showing that the search was lawful because it fell within one of the exceptions to the warrant requirement.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review >

Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress

In reviewing the district court's ruling on a motion to suppress, the appellate court reviews its conclusions of law de novo and its factual findings for clear error. a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. In reviewing the denial of such a motion, we view the evidence in the light most favorable to the government, and we give special deference to findings that are based on determinations of witness credibility. Whether the Fourth Amendment was violated, given the nonerroneous findings of historical fact, is a question of law, which the appellate court reviews de novo.

Criminal Law & Procedure > Arrests > Warrants
Criminal Law & Procedure > Arrests > Probable Cause
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > Extent & Manner of Search

Law enforcement authorities generally do not need a search warrant to enter a suspect's home when they have an arrest warrant for the suspect, as an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Further, it is well settled that a search incident to a lawful arrest is a traditional exception to the search warrant requirement of the Fourth Amendment. Thus, a search may be made of the person of the arrestee by virtue of the lawful arrest. In addition, a search may be made of the area within the control of the arrestee. When a person is arrested inside a residence, the officers may permissibly, as an incident to the arrest, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Such a security check or protective sweep is subject to limitations.

A protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

A protective sweep is without question a search; it is permissible on less than probable cause only because it is limited to that which is necessary to protect the safety of officers and others.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Plain View

The plain view doctrine is a recognized exception to the Fourth Amendment requirement of a warrant for seizures. Objects in plain view are not found through a privacy-invading search; thus, if plain view justifies an exception from an otherwise applicable warrant requirement, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches. Under the plain-view exception, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. If an article is already in plain view, neither its observation nor its seizure would

involve any invasion of privacy. However, the plain view doctrine cannot be invoked to justify an extended search; the doctrine is associated only with the seizure of items that are, as the label indicates, in plain view.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Plain View
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View

Under the security check exception, when law enforcement officers have lawfully entered premises in connection with an arrest, and in the course of making a permissible quick and limited protective sweep of the premises they see an object whose incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. The plain-view doctrine may allow discovered items to be admitted in evidence even where the discovery of the evidence was not inadvertent. Even though inadvertence is a characteristic of most legitimate plain-view seizures, it is not a necessary condition.

Criminal Law & Procedure > Appeals > Standards of Review

The appellate court is free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Reasonableness & Prudence Standard
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances

As reasonableness is always the touchstone of Fourth Amendment analysis, it is well-settled that the warrant requirement of the Fourth Amendment must yield in those situations in which exigent circumstances require law enforcement officers to act without delay, One well-recognized exception to the warrant requirement applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances

The various situations in which exigent circumstances may justify a warrantless search do not necessarily involve equivalent dangers, but in each the agents' action is potentially reasonable because there is compelling need for official action and no time to secure a warrant. Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause. Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause would impose a duty that is nowhere to be found in the Constitution.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances

The general exigency exception, which asks whether an emergency existed that justified a warrantless search or entry, naturally calls for a case-specific inquiry that looks to the totality of the circumstances. The reasonableness inquiry is fact-specific. The exigent circumstances exception always requires case-by-case determinations. And in any determination of whether there were exigent circumstances

sufficient to justify conduct for which the Fourth Amendment normally requires a warrant, the fundamental question is whether it was objectively reasonable for the law enforcement officers to believe there was an urgent need for that warrantless conduct. The ultimate determination of whether a search was objectively reasonable in light of exigent circumstances is a question of law reviewed de novo.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Destruction of Evidence
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Hot Pursuit
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances

Among the most common exigencies found to validate entry into a home with probable cause but without a warrant are the need to prevent the escape of a felon, and the need to prevent the destruction of evidence. But a warrantless entry or search must be strictly circumscribed by the exigencies which justify its initiation.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances

Once police eliminate the dangers that justify a security sweep, safety of police, destruction of evidence, escape of criminals, they must, barring other exigencies, leave the residence. Other exigencies, for example, may include the need to reenter or remain in the premises for the purpose of having the arrestee appropriately clothed, or the need, postarrest, to move to a different room in order to identify and question a third party who has sought to interfere with the arrest.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exigent Circumstances

The Second Circuit's nonexhaustive test for assessing whether the circumstances were sufficiently exigent to excuse the warrantless conduct, which is similar to the one recognized by the United States Supreme Court, King, considers, inter alia, (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry. These factors are intended not as an exhaustive canon, but as an illustrative sampling of the kinds of facts to be taken into account. Sometimes the presence of a solitary factor suffices, alternatively, a combination of several.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Elements

Drug trafficking is plainly a serious crime, one often accompanied by violence.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

The appellate court reviews a district court's evidentiary rulings under a deferential abuse of discretion standard, and it will disturb an evidentiary ruling only where the decision to admit or exclude evidence

was manifestly erroneous.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery

Threatened or actual use of force or violence is an element in robbery crimes.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

In order to prevail on an ineffective assistance of counsel claim, a defendant must show, inter alia, that counsel's representation fell below an objective standard of reasonableness. An attorney's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and counsel's obligation to consult with his client with regard to important decisions does not require counsel to obtain the defendant's consent to every tactical decision.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Judicial Discretion
Criminal Law & Procedure > Juries & Jurors > Voir Dire
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

The trial judge is authorized to remove a juror for good cause after deliberations have begun and to replace that juror with an alternate, so long as the reconstituted jury is instructed to begin deliberations anew. Good cause encompasses a variety of problems that may arise with respect to the jury, including misconduct. Misconduct includes lying on voir dire. Voir dire examination serves to protect the right to a fair trial by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious. The trial judge's decision to replace a juror for good cause is reviewable for abuse of discretion.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review

A district court commits a procedural error if it bases its sentence on a clearly erroneous finding of fact. It commits substantive error if its decision cannot be located within the range of permissible decisions.

Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Criminal Law & Procedure > Sentencing > Imposition > Evidence

Because the quantum of proof required for a verdict of guilt is higher than the quantum required for sentencing, it is established that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence. It is not an error for the sentencing court to rely on evidence at trial that the jury considered insufficient to establish a factual proposition beyond a reasonable doubt, where the court itself finds that proposition established by a preponderance.

Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations

Credibility assessments by the judge who presided over the trial are entitled to considerable deference, and where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Opinion

Opinion by: KEARSE

Opinion

{858 F.3d 139} KEARSE, *Circuit Judge*:

Defendant **David Delva** appeals from a judgment entered in the United States District Court for the Southern District of New York following a jury trial before Katherine B. Forrest, *Judge*, convicting him of conspiracy to commit robbery, in violation of 18 U.S.C. § 1951; conspiracy to commit kidnapping, in violation of *id.* § 1201; conspiracy to distribute narcotics, in violation of

21 U.S.C. § 846; possession**{2017 U.S. App. LEXIS 3}** of a firearm in furtherance of the drug trafficking offense, in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm, in violation of *id.* § 922(g), and sentencing him principally to 360 months' imprisonment. On appeal, Delva contends principally that the district court erred in denying his motions for suppression of his cellphone and of letters addressed to his **{858 F.3d 140}** uncle, Gregory Accilien, seized by law enforcement agents without a search warrant, from the bedroom he shared with Accilien. The district court ruled that the seizure of those items did not violate the Fourth Amendment because they were in plain view and were seized during a protective sweep of the apartment following Accilien's arrest in the apartment pursuant to an arrest warrant in connection with the kidnapping and robbery. Although we agree with Delva that the record shows that the cellphone and letters were in fact seized after the protective sweep had been completed and the agents had left and reentered the bedroom, we conclude that the agents' warrantless reentry into that room did not violate the Fourth Amendment because it was justified by the exigencies of the circumstances, given that the agents had found four adult males in the small apartment**{2017 U.S. App. LEXIS 4}** and had seen narcotics and a gun during the protective sweep, and that that bedroom was the only unoccupied room, other than the bathroom, in which to question Accilien and the others individually in order to determine whom to arrest for possession of the narcotics and gun. As the district court's findings that the cellphone and letters were in plain view in that room and were recognizable as evidence are not clearly erroneous, we reject Delva's challenge to the denial of his suppression motions. Rejecting as well his additional evidentiary, procedural, and sentencing challenges, *see* Part II.B. below, we affirm the judgment.

I. BACKGROUND

The present prosecution of Delva had its origin in the kidnapping and robbery of a woman and a man in the Bronx, New York, which began on Labor Day weekend in 2012. Those crimes were investigated by a joint task force of Federal Bureau of Investigation ("FBI") agents and New York City Police Department ("NYPD") detectives and officers (collectively or in combination, the "Officers"). The evidence against Delva at trial (his codefendants had pleaded guilty) included drugs, a gun, and a cellphone, all belonging to him, and letters sent to Accilien by**{2017 U.S. App. LEXIS 5}** Accilien's brother (the "Accilien Letters"). Prior to trial, Delva initially moved to suppress only the drugs and gun, and a hearing was held; Delva thereafter sought to suppress the cellphone and, eventually, the letters.

The following description of the relevant events is taken from findings by the district court after the suppression-motion hearing, from credited evidence at that hearing which included testimony by the

two law enforcement agents leading the investigation, and from evidence at Delva's ensuing trial which included testimony by those agents, Accilien, and the two victims of the kidnapping/robbery, as well as DNA evidence.

A. *The Kidnapping and Robbery*

Late on Sunday evening September 2, 2012, the female victim (or "FV"), who was the girlfriend of a drug dealer--the male victim (or "MV")--was accosted by codefendants Trevor Cole and Dominique Jean Philippe, brandishing guns, outside of her apartment in a building on Magenta Street. She was forced to enter the apartment with Cole and Jean Philippe, who proceeded to search unsuccessfully for drugs and money. FV was blindfolded and assaulted as Cole, Jean Philippe, and others who joined them attempted to force her to telephone**{2017 U.S. App. LEXIS 6}** MV to get him to come to her apartment. FV stalled for about a day by calling a number she knew had been disconnected; but she eventually yielded and reached MV after being raped by three of the intruders, and urinated on by one of them.

{858 F.3d 141} Accilien, the brother of Jean Philippe (who was the author of the Accilien Letters), became involved in the early stages of the robbery when he telephoned Jean Philippe in an attempt to borrow money. At Jean Philippe's request, Accilien purchased duct tape and latex gloves and brought them to FV's apartment, where Jean Philippe and Cole informed him that they were in the middle of a robbery. When Accilien expressed unease and decided to leave, Jean Philippe told Accilien to bring their nephew Delva to FV's apartment to assist because Delva had had more experience than Accilien in committing robberies. Accilien returned with Delva. All of the robbers donned the latex gloves brought by Accilien and waited for MV to arrive.

Accilien and Delva left FV's apartment on September 3; Delva returned early on September 4. MV arrived thereafter and was held captive by Cole, Jean Philippe, and Delva, attempting to force him to disclose where he kept his cash. MV**{2017 U.S. App. LEXIS 7}** was bound, blindfolded (albeit ineffectively), stabbed, and repeatedly beaten. Accilien, who had remained at home, attempted to call Jean Philippe, Cole, and Delva to learn whether the robbery was proceeding as planned; when none of them answered their phones, Accilien went to FV's apartment to see whether everything was all right. MV ultimately capitulated and revealed the location of his cash. Cole and Jean Philippe went to that location while Accilien and Delva remained behind to guard FV and MV. During that time, MV managed to shift his blindfold sufficiently to see Accilien, who complained to Delva about the intruders' blindfolding proficiency. Accilien testified that Delva then readjusted MV's blindfold and hit MV several times with a mop handle.

The home invasion ended on September 4, after the robbers got, *inter alia*, more than $40,000 in cash, jewelry, and clothing, along with six pounds of marijuana and FV's car.

B. *The Early Investigation*

The investigation of the kidnapping and robbery was led by FBI Special Agent John Reynolds and NYPD Detective Ellis Deloren. Deloren arrived at the kidnapping/robbery scene and spoke with FV and MV before they were taken to a hospital, and**{2017 U.S. App. LEXIS 8}** he later interviewed them at the hospital. Deloren prepared photographic arrays, each of which included one suspect. FV identified Cole from one array; MV identified Jean Philippe from another. A sealed federal indictment was filed in late October 2012; Cole and Jean Philippe were arrested about a week later, and the indictment was unsealed as to them. Pictures of several items stolen from MV were found on Cole's cellphone.

MV also identified Accilien from a photo array. Accilien had a significant criminal history, which included a charge of assault on a police officer, and Deloren found in police files Accilien's last

known address, a second-floor apartment on South Oak Drive in the Bronx. Deloren went to that address under the guise of looking for someone else who was supposedly wanted for a different crime. Accilien himself answered the street-level outer door, thereby allowing Deloren to infer that Accilien still lived at and/or frequented that address. An arrest warrant for Accilien was issued.

At about 6:00 a.m. on June 4, 2013, approximately 10 Officers, led by Deloren and Reynolds, went to the South Oak Drive address, knocked on the outer door, and identified themselves as police.**{2017 U.S. App. LEXIS 9}** Deloren, through the door's window, saw a man he thought was Accilien start to descend the stairs and promptly retreat; the Officers then breached the door and entered. In the second-floor apartment they found **{858 F.3d 142}** Accilien, a woman and two children, and three other men--including Delva, who at that time was not a suspect in the kidnapping/robbery.

C. *The Denial of Delva's Suppression Motions*

The events following the Officers' entry into the building are recounted in the findings of the district court in denying Delva's initial suppression motion--which challenged the seizure only of the drugs and gun. *See United States v. Delva*, No. 12 Cr. 802 (KBF), 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149 (S.D.N.Y. Jan. 27, 2014) ("*Delva I*"). The findings in that opinion--uncontested on appeal, except for a general challenge to credibility--include the following.

"The outer door entered onto a staircase that leveled off at a landing adjoining the kitchen. There was no interior door between the stairs and the kitchen." *Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *2 (citations to the suppression hearing transcript ("H.Tr.") omitted). The apartment consisted of a kitchen, a bedroom/living room (the "living room"), a second bedroom (or "bedroom"), and a bathroom. "The apartment was about 500 square feet in total." *Id.*

> As Reynolds was climbing the stairs, he could**{2017 U.S. App. LEXIS 10}** see Accilien at the top looking down at him. Both Reynolds and Deloren were stating: "Police, get down." Accilien complied and lay down on the floor in the kitchen. As Reynolds reached the top of the stairs, he saw two other men in the kitchen; Reynolds stepped further into the kitchen and instructed the two other men to get down. The kitchen was very small. Reynolds then noticed somebody in the second bedroom . . . . [whom he] later identified . . . as Delva.2014 U.S. Dist. LEXIS 14930, [WL] at *3 (citations to H.Tr. omitted). Both Reynolds and Deloren observed Delva inside the second bedroom walking toward the kitchen. *See id.*
>
> Reynolds instructed Delva to get down on the ground. Delva did not immediately comply; Reynolds had to instruct him several times, and he did eventually comply. When Delva was lying on the ground, his head was in the bedroom near the doorway, with the rest of his body and legs stretching behind him into the bedroom. Reynolds then stepped either to the side of Delva or over Delva to make sure no one else was in the room. Reynolds testified that he could not see the entire bedroom from the kitchen and needed to enter the bedroom to determine if anyone else was in that room and whether there could be**{2017 U.S. App. LEXIS 11}** any threats coming from that room.
>
> When Reynolds entered the bedroom and looked to see if anyone else was present, he noticed a closet, the door of which was ajar. He saw a clear, plastic bag on the floor of the closet that contained a white, powdery substance which he believed to be drugs. The bag was on top of or right next to sneakers. Reynolds testified that he did not touch anything or open anything before seeing the bag and the sneakers.
>
> Immediately thereafter, Deloren entered the bedroom. He [had] handcuffed Accilien very quickly and proceeded to the second bedroom. He saw that Delva was on the ground, his body

completely inside the bedroom. Reynolds was focused on Delva and told Deloren about the bag in the closet. Deloren stated that the closet door was open when he approached it. He could see the floor of the closet and saw a clear, plastic bag with a white powdery substance in it; based on his experience he believed it to be cocaine. Deloren bent down to pick the bag up and saw that just to the side of it, only a few inches away, was a sneaker with a firearm in it. The gun **{858 F.3d 143}** was inserted barrel-first into the shoe. Deloren then used the word "lunch" to notify Reynolds and others**{2017 U.S. App. LEXIS 12}** that there was a gun. Deloren then quickly recovered the gun and made it safe by removing the magazine and emptying the chamber.

As he was handcuffing Delva, Reynolds heard Deloren almost immediately use the word "lunch," which Reynolds understood to be code for "gun." *Reynolds then moved Delva into the kitchen with the others. Only two minutes had elapsed between the time the Officers entered the apartment and the apartment was secured with the men in handcuffs in the kitchen.* Deloren testified that the men in the apartment were handcuffed to ensure officer safety.

Reynolds and Deloren then brought Accilien into the bedroom and asked him to identify the other people in the apartment; Accilien identified Delva as his nephew and the closet in the bedroom as belonging to Delva.*Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *3-*4 (footnote and citations to H.Tr. omitted) (emphases added).

The district court concluded that given the presence of other people in the apartment and the Officers' knowledge of Accilien's criminal history, "it would . . . have been imprudent and unreasonable for the Officers to have entered the premises, seen the other men, and *not* conducted a protective sweep." *Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *6 (emphasis added). Further,

when Reynolds saw the defendant**{2017 U.S. App. LEXIS 13}** in his bedroom, moving towards them, it was only prudent for Reynolds to ensure that the defendant was not going to create a safety issue. It was therefore perfectly appropriate for Reynolds to instruct the defendant to "get down." Reynolds and Deloren testified that, when the defendant was on the ground, he was positioned entirely inside the bedroom. There is no doubt that it was appropriate for Reynolds to step into the bedroom at that point in order to secure the defendant. Once Reynolds entered the bedroom, it was perfectly reasonable for him to look quickly around the room to determine if there were any other individuals in the room who might constitute a safety risk. *In doing so, his eyes noticed the open door to the closet and drugs in plain view. Deloren's entry to assist Reynolds led to recovery of the drugs Reynolds saw as well as the gun immediately next to it, which was also in plain view.*

There is no evidence in the record that the drugs and gun were not in the position in which Deloren and Reynolds testified they were in--on the floor of the closet, with the door open, in plain view.

Under these circumstances, the factual record is straightforward and supportive of a reasonable**{2017 U.S. App. LEXIS 14}** search and seizure of the [*drugs and gun*]. Under the circumstances described above, the protective sweep conducted by Reynolds and Deloren was reasonable. In addition, there is no factual basis to suggest that, once Reynolds and Deloren were in the bedroom, the [*drugs and gun*] w[ere] not in plain view. All of the evidence before the Court is that they were. Given the highly incriminating character of these items, their seizure was therefore perfectly lawful.*Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *7 (emphases added).

The district court also noted that, "[o]n cross-examination," at the hearing, "Deloren testified that,

when the Officers first went to the residence, their intent was to arrest Accilien but not conduct a search; after recovering the [drugs and gun], the Officers then performed a general search." **{858 F.3d 144}** 2014 U.S. Dist. LEXIS 14930, [WL] at *7 n.5. However, the court concluded that that "testimony d[id] not undermine the legality of the recovery of the [drugs and gun]--these items were found in plain view during what was clearly a protective sweep." *Id.*

At the hearing on Delva's initial motion--to suppress the drugs and gun--Reynolds and/or Deloren testified that in the June 4, 2013 raid on Accilien's apartment, cellphones (one of which they later learned belonged to Delva) and**{2017 U.S. App. LEXIS 15}** the Accilien Letters had also been seized. Deloren testified that he saw the envelopes on the top of a small cabinet; he recognized that Accilien was the addressee and that the sender was Jean Philippe, whom Deloren had arrested in November 2012 in connection with the kidnapping and robbery of FV and MV.

During the hearing with respect to the drugs and gun, Delva expanded his suppression request to include his cellphone. The district court invited supplemental briefing on that request, and Delva's supplemental reply brief added a request to suppress the Accilien Letters. The government's position was that "law enforcement observed [those] items in plain view"--along with the drugs and the gun--"[d]uring a lawful protective sweep." (Government's Memorandum of Law in Opposition to Defendant David Delva's Motion To Suppress His Cellular Telephone, dated February 3, 2014, at 3-4.)

The district court, relying on evidence presented at the hearing following Delva's motion to suppress the drugs and gun, denied these supplemental motions to suppress Delva's cellphone and the Accilien Letters. *See United States v. Delva*, 13 F.Supp.3d 269 (S.D.N.Y. 2014) ("*Delva II*"). The court reiterated many of the findings it had made in *Delva I* with respect to the need**{2017 U.S. App. LEXIS 16}** for a protective sweep of the apartment and the plain-view observation of the drugs and gun, *see, e.g., Delva II*, 13 F.Supp.3d at 272 ("The facts relevant to resolution of this motion were established at the evidentiary hearing on January 21, 2014. They are recited in this Court's January 27, 2014, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, decision on defendant Delva's first motion to suppress . . . ."), and it made additional findings focusing on the cellphone and the letters.

With respect to the cellphone, the court noted that the Officers had gone to the apartment to arrest Accilien because

> Accilien was alleged to have participated in a brutal robbery and kidnapping. At the time of the arrest, the officers who entered the Apartment knew that one or more cell phones had been used during the robbery and kidnapping.*Delva II*, 13 F.Supp.3d at 271. After noting that the government argued that the Officers had seen "drugs, a gun, *and the Cell Phone* in plain view" "during the course of legitimate efforts *incidental to a protective sweep* that was itself incident to the arrest of Accilien," and that it was "undisputed that the Officers saw the drugs and gun *prior to* seeing the Cell Phone," *id.* (emphases added), the court stated that
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> Delva's arguments on this motion are *the same as those**{2017 U.S. App. LEXIS 17}** on his prior motion* with respect to *the gun and drugs*: (1) the Officers[] had no need or right to enter the Apartment; (2) once in the Apartment, the Officers had no right to enter the bedroom which the defendant shared with others; (3) that the Cell Phone, which was recovered in the bedroom, was not in plain view; and (4) even if the Cell Phone was in plain view, it was not in and of itself contraband, evidence of a crime, or associated with evidence of a crime,*Delva II*, 13 F.Supp.3d at 271-72 (emphases added). The district court rejected those arguments, noting that Delva
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> **{858 F.3d 145}** proffered no evidence, nor elicited any evidence on cross-examination, that at the time it was seized, the Cell Phone was not in plain view in a bedroom that had been occupied

the previous night by Accilien (the robbery and kidnapping suspect).*Id.* at 271. After describing Deloren's discovery and unloading of Delva's gun, the court found as follows:

> *Reynolds then moved Delva into the kitchen with the others. Only two minutes had elapsed between the time the Officers entered the Apartment and the Apartment was secured with the men in handcuffs in the kitchen. Reynolds and Deloren then brought Accilien into the bedroom and asked him to identify the other people**{2017 U.S. App. LEXIS 18}** in the Apartment*; Accilien identified Delva as his nephew and the closet in the bedroom as belonging to Delva. . . .
>
> The Apartment was small. Two Officers stepped into the bedroom with Accilien to ask him who the other individuals were and to whom the items in the closet belonged. *While that was occurring, the Officers noticed and seized a letter and two cell phones.* The two cell phones were in plain view: one on a television stand and the other on the bed. At about the same time, Reynolds [*sic*] also saw an envelope in plain view with Accilien's name as the addressee. Reynolds [*sic*] saw that the sender of the envelope was one of the suspects in the same robbery and kidnapping; the letter had been sent from the sender's place of incarceration. While the cabinet on which the letter was located had a number of items on it, Special Agent Reynolds [*sic*] testified credibly that there was room for the letter to be in plain view on the cabinet with the address information visible.*Delva II*, 13 F.Supp.3d at 273-74 (footnote and citations to H.Tr. omitted) (emphases added).

Having noted that "[p]atently incriminating evidence that is in plain view *during a proper security check* may be seized without a warrant," *id.* at 275 (internal quotation marks**{2017 U.S. App. LEXIS 19}** omitted) (emphasis ours), the district court denied Delva's supplemental suppression motions, concluding as follows:

> *This Court previously determined that the Officers[']* entry into both the Apartment and the bedroom in which the defendant had been living was lawful. . . . The Court also previously determined that the *drugs and gun* which the Officers seized were in plain view. . . . No facts have been proffered disputing the fact that the cell phones were observed by Special Agent Reynolds in plain view on a table and on the bed in the bedroom in which Delva was arrested.
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> *There were multiple lawful reasons why the Officers had probable cause to believe that the Cell Phone was evidence of or contained evidence of criminal activity: the Officers were in the Apartment to arrest a man (Accilien) whom they were arresting for kidnapping, and they knew that cell phones had been used in connection with that crime.* Accilien identified himself as an occupant of the bedroom in which the cell phones were found, and a letter addressed to Accilien was found on a table in that bedroom from another individual who was already incarcerated for the same crime. At the time of its seizure, the Officers believed**{2017 U.S. App. LEXIS 20}** that the cell phones belonged to Accilien. *The Officers had probable cause to seize the Cell Phone even if they believed or had reason to believe that it may have belonged to defendant Delva: Delva had just been handcuffed in the same **{858 F.3d 146}** room, drugs and a gun had been found in plain view near him, and Accilien had identified the items in the closet as belonging to Delva.* The association between narcotics trafficking (for which Delva was initially arrested) and cell phones has been long established--cell phones can store information and images relating to the crime and participants in the crime (that is, who bought and sold the drugs).
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> In determining whether probable cause to seize the Cell Phone existed, the Court looks at the totality of the facts and circumstances as they existed at the scene. . . . Those facts and circumstances leave no doubt that the Officers were acting within the law when they seized the Cell Phone. . . . The Fourth Amendment of the Constitution only prohibits *unreasonable* searches and seizures; here, the seizure was perfectly reasonable.FN4

FN4 On cross-examination, Deloren testified that, when the Officers first entered the Apartment, their intent was to arrest Accilien but not to conduct a search;**{2017 U.S. App. LEXIS 21}** after recovering the drugs and gun, the Officers then performed a general search. This testimony does not undermine the legality of the recovery of *the Cell Phone--it was found in plain view during what was clearly a protective sweep.Delva II*, 13 F.Supp.3d at 277 & n.4 (citations to H.Tr. omitted) (penultimate emphasis in original; other emphases added).

D. *The Trial*

As indicated above, at the time of his arrest on June 4, 2013, Delva was not a suspect in the kidnapping and robbery of FV and MV. Accilien, who began to cooperate with the authorities almost immediately after his arrest, did not reveal that Delva was involved in those crimes until mid July. Thus, the drugs and gun found in Delva's closet on June 4 initially led to his arrest only on New York State drug and gun charges. After the Accilien Letters were reviewed by the Officers, however, Delva became a suspect: In one of the letters, received by Accilien several weeks after Jean Philippe was arrested, Jean Philippe wrote that he had not cooperated with the authorities, and he urged Accilien and Delva to "stand[] tall" and not inform on Jean Philippe. In August 2013, Delva was rearrested on federal charges, alleging not only narcotics and firearm offenses,**{2017 U.S. App. LEXIS 22}** but also substantive and conspiracy kidnapping and robbery crimes against FV and MV.

At Delva's trial (Cole and Jean Philippe by then had pleaded guilty to charges relating to the kidnapping and robbery and had been sentenced to prison terms of life plus seven years) the government's evidence included testimony by FV and MV and law enforcement officials; Accilien testified about his and Delva's involvement in the kidnapping and robbery and about Delva's narcotics distribution business. The government also presented evidence that one of the latex gloves recovered from FV's apartment contained Delva's DNA.

The jury found Delva guilty of conspiring to commit kidnapping and robbery, in violation of 18 U.S.C. §§ 1201 and 1951; conspiring to distribute narcotics, *see* 21 U.S.C. § 846; and substantive firearms offenses, *see* 18 U.S.C. §§ 924(c) and § 922(g). It found Delva not guilty of the substantive offenses of kidnapping, robbery, and use of a gun in furtherance of kidnapping and robbery. He was sentenced principally to 360 months' imprisonment, *see* Part II.B.3. below.

II. DISCUSSION

On appeal, Delva contends principally that the district court erred in denying his **{858 F.3d 147}** motions to suppress his cellphone and the Accilien Letters, arguing chiefly that the court**{2017 U.S. App. LEXIS 23}** erred in finding that the seizure of those items occurred during the Officers' protective sweep of the apartment. He also contends, *inter alia*, that the district court abused its discretion (a) in allowing FV to testify that she was raped during the home invasion, because she could not identify Delva as one of those who raped her, (b) in excusing a juror before the end of trial, and (c) in imposing a severe sentence based in part on conduct of which he was acquitted; we find no merit in these contentions for the reasons stated in Part II.B. below. For the reasons discussed in Part II.A. below, we see no error in the district court's findings that the cellphone and letters--recognizable as likely evidence (cellphones having been used in the kidnapping/robbery, and the letters being post-kidnapping/robbery communications between two of the charged coconspirators)--were in plain view in the second bedroom; but the court erred in finding that the cellphone and letters were seen and seized during the Officers' protective sweep. The record and the court's findings reveal that the apartment was secured before the Officers reentered the bedroom, and that the cellphone and letters were seen**{2017 U.S. App. LEXIS 24}** only after their reentry. Nonetheless, we affirm the denial of the motions to suppress those items because we conclude that

the agents' warrantless reentry into that bedroom was justified by the exigencies of the circumstances, and thus did not violate the Fourth Amendment, given that the agents had found four adult males in the small apartment and had seen narcotics and a gun during the protective sweep, and that that bedroom was the only unoccupied room, other than the bathroom, in which to question Accilien and the others individually in order to determine whom to arrest for possession of the narcotics and gun.

A. *Fourth Amendment Issues*

The Fourth Amendment to the Constitution provides that "[t]he 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 . . . ." U.S. Const. amend. IV. "It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (internal quotation marks omitted). Thus, generally, as "a basic principle of Fourth Amendment law," entries into a home without a warrant, or "searches and seizures inside a home without a warrant[,] are presumptively unreasonable," *id.* at 749 (internal quotation**{2017 U.S. App. LEXIS 25}** marks omitted); *Kentucky v. King*, 563 U.S. 452, 459, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (internal quotation marks omitted). However, the Court

> ha[s] also recognized that this presumption may be overcome in some circumstances because "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" . . . . Accordingly, the warrant requirement is subject to certain reasonable exceptions.*Id.* at 459 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) ("*Brigham City*")). The "'few[,] specifically established[,] and well-delineated exceptions,'" *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)), include security-based limited searches in conjunction with an in-home arrest pursuant to an arrest warrant (*see* Part II.A.1. below), entries into a home in exigent circumstances (*see* Part II.A.4. below), **{858 F.3d 148}** and seizures by the officers of "any evidence that is in plain view during the course of their legitimate emergency activities," *Mincey*, 437 U.S. at 393 (*see* Part II.A.2. below).

As a procedural matter, a defendant seeking suppression of evidence found without a search warrant must show that he had a reasonable expectation of privacy in the place or object searched. *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 39, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988); *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986); *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 131 n.1, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). If such a privacy interest is established, the government has the burden of showing that the search was lawful because it fell within one of the exceptions to the warrant requirement. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Welsh*, 466 U.S. at 750 (exigent circumstances);**{2017 U.S. App. LEXIS 26}** *United States v. Kiyuyung*, 171 F.3d 78, 83 (2d Cir. 1999) (plain view).

"In reviewing the district court's ruling on a motion to suppress, we review its conclusions of law *de novo* and its factual findings for clear error." *United States v. Medunjanin*, 752 F.3d 576, 584 (2d Cir.), *cert. denied*, 135 S. Ct. 301, 190 L. Ed. 2d 219 (2014); *see generally Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) ("a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"). In reviewing the denial of such a motion, we "view[] the evidence in the light most favorable to the government," *United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009), *cert. denied*, 559 U.S. 998, 130 S. Ct. 1749,

176 L. Ed. 2d 223 (2010), and we give "special deference to findings that are based on determinations of witness credibility," *United States v. Lucky*, 569 F.3d 101, 106 (2d Cir. 2009), *cert. denied*, 559 U.S. 1031, 130 S. Ct. 1878, 176 L. Ed. 2d 403 (2010). Whether the Fourth Amendment was violated, given the nonerroneous findings of historical fact, is a question of law, which we review *de novo. See id.* at 105-06.

1. *Protective Sweeps*

Law enforcement authorities generally do not need a search warrant to enter a suspect's home when they have an arrest warrant for the suspect, as "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Further, "[i]t is well settled that a search**{2017 U.S. App. LEXIS 27}** incident to a lawful arrest is a traditional exception to the [search] warrant requirement of the Fourth Amendment." *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). Thus, "a search may be made of the person of the arrestee by virtue of the lawful arrest. [In addition,] a search may be made of the area within the control of the arrestee." *Id.* (emphasis omitted).

> When a person is arrested inside a residence, the officers may permissibly,
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> as an incident to the arrest . . . , as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.**{858 F.3d 149}** *Maryland v. Buie*, 494 U.S. 325, 334, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). Such a security check or "protective sweep" is subject to limitations. The *Buie* Court
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> emphasize[d] that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found.FN3 The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.
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> FN3 . . . . A protective sweep is without question a "search" . .**{2017 U.S. App. LEXIS 28}** . ; [it is] permissible on less than probable cause only because [it is] limited to that which is necessary to protect the safety of officers and others.*Id.* at 335-36 & n.3.

2. *The Plain View Doctrine*

The "plain view" doctrine is a recognized exception to the Fourth Amendment requirement of a warrant for seizures. *See, e.g., Horton v. California*, 496 U.S. 128, 134, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (objects in plain view are not found through a privacy-invading search; thus, "[i]f 'plain view' justifies an exception from an otherwise applicable warrant requirement, . . . it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches"). Under the plain-view exception, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *see Horton*, 496 U.S. at 136-37; *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983). "If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton*, 496 U.S. at 133. However, the "plain view" doctrine cannot be invoked to justify an extended search; "the doctrine is associated only with the seizure of items" that are--as the label indicates--in plain view. *Ruggiero v. Krzeminski*, 928 F.2d 558, 562 (2d Cir. 1991).

Thus, under the "security{2017 U.S. App. LEXIS 29} check" exception, when law enforcement officers have lawfully entered premises in connection with an arrest, and in the course of making a permissible quick and limited protective sweep of the premises they see an object whose incriminating character is immediately apparent, "and if the officers have a lawful right of access to the object, they may seize it without a warrant," *Dickerson*, 508 U.S. at 375; *see Horton*, 496 U.S. at 136-37. The plain-view doctrine may allow discovered items to be admitted in evidence even where "the discovery of the evidence was not inadvertent." *Id.* at 130 ("even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition").

3. *The District Court's Decision*

In support of his contention that the district court erred in denying his supplemental motions to suppress his cellphone and the Accilien Letters, Delva argues principally that the court erred in ruling that those items were seen and seized during the Officers' protective sweep of the apartment. He also contends that those items were not in fact in plain view and that the testimonies of Reynolds and Deloren were not credible. Leaving aside the {858 F.3d 150} question of whether Delva even has standing to challenge the seizure{2017 U.S. App. LEXIS 30} of the Accilien Letters, which were not authored by or addressed to Delva--an issue not raised by the government in the district court--we find no basis for reversal.

The challenges to the court's credibility assessments and to its findings as to where the cellphone and letters were found do not require extended discussion. First, we see no basis in the present record for overturning the credibility determinations by the district judge, who had the opportunity to view and hear the witnesses. Second, for the proposition that the letters were not in plain view, Delva cites testimony by Accilien at trial that the letters were in the closet. Accilien, however, was not called as a witness at the suppression hearing. At that hearing, the only witness as to the location of the letters was Deloren, who testified that he saw them on the top of a low cabinet. Apart from the district court's misattributing to Reynolds the Deloren testimony as to the observation of the letters, its finding that the Accilien Letters were in plain view is not clearly erroneous.

Delva's contention that the district court erred in ruling that his cellphone and the Accilien Letters were seen and seized during the Officers'{2017 U.S. App. LEXIS 31} protective sweep of the apartment gives us greater pause. While most of the court's findings, further discussed in Part II.A.4. below, are amply supported by the record, we see three difficulties with the court's conclusion that Delva's motions to suppress those items should be denied because they were seen during the protective sweep: (1) the court misunderstood the basis for Delva's principal argument for suppression of the cellphone and the letters; (2) it assumed that its prior findings with respect to the drugs and the gun were fully applicable to the cellphone and the letters; and (3) it failed to take into account that the protective sweep had been completed before the Officers reentered the bedroom and saw the cellphone and letters.

First, the court stated that Delva's arguments in support of his request to suppress his cellphone and the Accilien Letters were "the same as those on his prior motion with respect to the gun and drugs," *i.e.*, essentially that "the Officers had no right to enter" the apartment or the bedroom, and that the cellphone "was not in plain view" and was not contraband or evidence of a crime. *Delva II*, 13 F.Supp.3d at 271-72. However, Delva argued that the hearing testimony established{2017 U.S. App. LEXIS 32} that by the time the cellphone and letters were found, the protective sweep had in fact been completed: argument.

> [T]he [government's] Opposition Memorandum claims the cell phones and envelope were observed in the bedroom, "in plain view," during the protective sweep. However, this allegation is

not accurate and belied by the record. *The Hearing established, during the protective sweep, only the gun and crack cocaine were observed and seized by the agents.* This observation, and seizure, occurred while Mr. Delva was handcuffed (while lying on the floor of his bedroom). After the gun and cocaine were recovered from the closet, the agents lifted Mr. Delva (who was handcuffed) off the ground and walked him, out of the bedroom, into the kitchen. (Hearing p. 29-30, 45). In addition, at that time, one of the agents further checked the bedroom closet and looked under the bed to make sure no one else was in the bedroom. (Hearing p. 50).

After Mr. Delva, and the agents, were out of the, now vacant and secure, bedroom, the agents asked Mr. Delva for his consent to re-enter and search his bedroom. (Hearing p. 32). Mr. Delva **{858 F.3d 151}** expressly refused to give consent to the agents. *Id.* Nonetheless, thereafter,**{2017 U.S. App. LEXIS 33}** agents re-entered the bedroom with Accilien. Supposedly, *while in the room*, Accilien gave consent to search the bedroom. *During the course of this general search*, the cell phones and envelope were allegedly observed to be in "plain view." (Hearing p. 87-90). In addition, other items such as a box of ammunition, was [*sic*] recovered from a closed drawer. (Hearing p. 87-88).

However, *after the protective sweep was completed, and after the agents had left the bedroom with Mr. Delva, there was no lawful basis to re-enter the bedroom. The bedroom was clear and secure pursuant to the prior protective sweep.* In addition, *Mr. Delva, Accilien and all of the other occupants had been secured.* (Hearing p. 72-73). Moreover, Mr. Delva expressly refused to give the agents consent to re-enter and search the bedroom. *Under these circumstances, the re-entry into the bedroom, with Accilien, was not a part of a protective sweep. It was a warrantless reentry, into Mr. Delva's bedroom, in violation of the Fourth Amendment.* As such, all items seized (including the cell phone, letters and anything else) must be suppressed.(Delva Reply Memorandum of Law in Further Support of Defendant's Motion To Suppress Cellular Telephone**{2017 U.S. App. LEXIS 34}** and Other Property at 3-5 (emphases added).) The court did not acknowledge this

Second, the district court noted that it had "previously [in *Delva I*] determined that the Officers[']entry into . . . the bedroom in which [Delva] had been living was lawful," *Delva II*, 13 F.Supp.3d at 277. But that prior determination was made in connection with Delva's initial motion, which had sought suppression of only the drugs and the gun, *see Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *1 ("Delva moved to suppress evidence of drugs and a gun (the 'Evidence')"); 2014 U.S. Dist. LEXIS 14930, [WL] at *7 (concluding that the record showed a "reasonable search and seizure of the Evidence" because "the protective sweep conducted by Reynolds and Deloren was reasonable"). The drugs and gun were seen during the Officers' first visit to the bedroom while they were conducting the protective sweep. There was no testimony that cellphones and letters were seen before Deloren and Reynolds completed their protective sweep of the bedroom and took Delva into the kitchen. Thus, the district court's prior ruling with respect to the drugs and the gun could not be controlling with respect to the cellphone and letters.

Finally, although the district court noted that "the Officers saw the drugs and gun *prior to* seeing the Cell Phone,"**{2017 U.S. App. LEXIS 35}** *Delva II*, 13 F.Supp.3d at 271 (emphasis added), it failed to recognize that the second sighting did not occur during the protective sweep, and occurred only after that sweep had been completed and the Officers had vacated the bedroom and then returned. The court found, based on the testimonies of Reynolds and Deloren, that after the Officers entered the apartment, Accilien and the two men other than Delva had promptly complied with the Officers' orders to lie down on the floor and had been handcuffed in the kitchen; that Deloren, after quickly handcuffing Accilien, went into the bedroom where Reynolds was handcuffing Delva; that after Deloren retrieved and unloaded the gun seen in the bedroom closet, Reynolds moved Delva into the

kitchen with Accilien and the other two handcuffed men; and that the protective sweep had been completed in no more than two minutes. *See Delva II*, 13 F.Supp.3d at 271-73; *Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *3-*4. The court found that after "Reynolds . . . moved Delva into the kitchen with the others . . . . Reynolds and Deloren *then* brought Accilien into the bedroom" to **{858 F.3d 152}** question him, *Delva II*, 13 F.Supp.3d at 273 (emphasis added); *Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *4 (emphasis added), and saw the cellphone and letters "in plain view," *Delva II*, 13 F.Supp.3d at 274.

We conclude that the district court's bottom-line finding that Delva's cellphone and**{2017 U.S. App. LEXIS 36}** the Accilien Letters were found "during" the protective sweep, *e.g.*, *id.* at 277 n.4 ("the Cell Phone . . . was found in plain view during what was clearly a protective sweep"), is clearly erroneous. The above detailed factual findings make it plain that the Officers returned to the bedroom with Accilien only after the protective sweep had been completed, and that they saw the cellphone and letters only after their return and not during their protective sweep. Thus, the discovery of the cellphone and the letters was not covered by the protective-sweep exception to the Fourth Amendment's warrant requirement.

4. *The Exigent Circumstances Exception*

The conclusion that the plain-view discovery of Delva's cellphone and the Accilien Letters did not occur during the Officers' protective sweep of the apartment, however, does not end our inquiry, for "[w]e are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied," *Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir.), *cert. denied*, 516 U.S. 877, 116 S. Ct. 207, 133 L. Ed. 2d 140 (1995). Based on other findings that are not clearly erroneous, we conclude that despite the fact that Delva's cellphone and the Accilien Letters were seen in a room reentered by the Officers after the conclusion of the protective sweep,**{2017 U.S. App. LEXIS 37}** the Officers' reentry into that room did not violate the Fourth Amendment.

As "reasonableness is always the touchstone of Fourth Amendment analysis," *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186, 195 L. Ed. 2d 560 (2016); *see, e.g.*, *Brigham City*, 547 U.S. at 403; *United States v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) ("[w]e must balance the nature and quality of the intrusion on . . . Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"), "[i]t is well-settled . . . that the warrant requirement of the Fourth Amendment must yield in those situations in which exigent circumstances require law enforcement officers to act without delay," *United States v. Moreno*, 701 F.3d 64, 72-73 (2d Cir. 2012) ("*Moreno*") (internal quotation marks omitted), *cert. denied*, 133 S. Ct. 2797, 186 L. Ed. 2d 864 (2013); *see, e.g.*, *King*, 563 U.S. at 460 ("One well-recognized exception" to the warrant requirement applies when "'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" (quoting *Mincey*, 437 U.S. at 394) (other internal quotation marks omitted)); *United States v. Andino*, 768 F.3d 94, 98 (2d Cir. 2014) ("*Andino*"); *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990) (en banc) ("*MacDonald*"), *cert. denied*, 498 U.S. 1119, 111 S. Ct. 1071, 112 L. Ed. 2d 1177 (1991).

The various situations in which exigent circumstances may justify a warrantless search "do not necessarily involve equivalent dangers," but in each the agents' action "is potentially reasonable because 'there is compelling need for official action and no time to secure a warrant.'" *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)); *but see King*, 563 U.S. at 467 **{858 F.3d 153}** ("[L]aw enforcement**{2017 U.S. App. LEXIS 38}** officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable

cause. . . . Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause [would] impose[] a duty that is nowhere to be found in the Constitution." (internal quotation marks omitted)). "[T]he general exigency exception, which asks whether an emergency existed that justified a warrantless search [or entry], naturally calls for a case-specific inquiry" that looks to the "totality of the circumstances." *McNeely*, 133 S. Ct. at 1559 & n.3; *see, e.g., Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996) (the reasonableness inquiry is "fact-specific"); *Birchfield*, 136 S. Ct. at 2180 (the "exigent circumstances" exception "always requires case-by-case determinations"). And in any determination of whether there were exigent circumstances sufficient to justify conduct for which the Fourth Amendment normally requires a warrant, the fundamental question is whether it was objectively reasonable for the law enforcement officers to believe there was an urgent need for that warrantless conduct. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2487, 2494, 189 L. Ed. 2d 430 (2014); *King*, 563 U.S. at 460-62; *Mincey*, 437 U.S. at 394. "'[T]he ultimate determination of whether a search was objectively reasonable in light of exigent circumstances is**{2017 U.S. App. LEXIS 39}** a question of law reviewed *de novo*.'" *Andino*, 768 F.3d at 98 (quoting *Moreno*, 701 F.3d at 72).

Among the most common exigencies found to validate entry into a home with probable cause but without a warrant are the need to prevent the escape of a felon, *see, e.g., United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976) (officers may enter a home without a warrant when they are in hot pursuit of a fleeing suspect), and the need to prevent the destruction of evidence, *see, e.g., King*, 563 U.S. at 462; *Brigham City*, 547 U.S. at 403 (the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search). "But a warrantless [entry or] search must be strictly circumscribed by the exigencies which justify its initiation . . . ." *Mincey*, 437 U.S. at 393 (internal quotation marks omitted). For example, in *Tyler*, the Supreme Court ruled that entry into a burning building "to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze," 436 U.S. at 511, and during that time they "may seize evidence of arson that is in plain view," *id.* at 509.

> *Fire officials are charged not only with extinguishing fires, but with finding their causes.* Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the**{2017 U.S. App. LEXIS 40}** detection of continuing dangers such as faulty wiring or a defective furnace. *Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction.* And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. *For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.Id.* at 510 (footnote omitted) (emphases added). However, "[t]hereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative **{858 F.3d 154}** searches." *Id.* at 511. For similar reasons, our Court, in *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990), in dealing with a protective sweep, has noted that "[o]nce police eliminate the dangers that justify a security sweep--safety of police, destruction of evidence, escape of criminals--they must, *barring other exigencies*, leave the residence," *id.* at 447 (emphasis added). Other exigencies, for example, may include the need to reenter or remain in the premises for the purpose of having the arrestee appropriately clothed, *see, e.g., United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977); *United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir.), *cert. denied*, 531 U.S. 1025, 121 S. Ct. 596, 148 L. Ed. 2d 509 (2000), or the need, postarrest,**{2017 U.S. App. LEXIS 41}** to move to a different room in order to identify and question a third party who has sought to interfere with the arrest, *see, e.g., United States v. Ocean*, 564 F. App'x 765, 771 (6th Cir. 2014) ("[t]he officers' removal of [the third party] from the

hallway into the apartment bedroom was reasonable under the circumstances"); *see also id.* at 772 (concurring opinion of White, *J.* ("The facts support a finding of exigency here.")).

Our Court's nonexhaustive test for assessing whether the circumstances were sufficiently exigent to excuse the warrantless conduct, *see, e.g., MacDonald*, 916 F.2d at 769-70-- which "is similar to the one . . . recognize[d]" by the Supreme Court, *King*, 563 U.S. at 463 considers, *inter alia*,

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause . . . to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry,*MacDonald*, 916 F.2d at 769-70 (internal quotation marks omitted) ("*MacDonald* factors"); *see, e.g., Andino*, 768 F.3d at 98 & n.3; *Moreno*, 701 F.3d at 73. These
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> factors are intended not as an exhaustive canon, but as an illustrative sampling of the**{2017 U.S. App. LEXIS 42}** kinds of facts to be taken into account. . . . Sometimes the presence of a solitary factor suffices, *see, e.g., United States v. Gallo-Roman*, 816 F.2d 76, 79-80 (2d Cir.1987) (destruction of evidence), alternatively, a combination of several, *see, e.g., United States v. Callabrass*, 607 F.2d 559, 563-64 (2d Cir.1979), *cert. denied*, 446 U.S. 940, 100 S. Ct. 2163, 64 L. Ed. 2d 794 (1980) (destruction of evidence and danger to public).*MacDonald*, 916 F.2d at 770.

Adapting this test to the present case--since we are concerned with (a) the Officers' remaining in the apartment beyond the time when the arrest of Accilien had been accomplished, and (b) a reentry, rather than an initial entry (the Officers having lawfully entered the apartment pursuant to the arrest warrant), into a room in which there were no longer any potentially threatening persons (the protective sweep having been lawfully completed and all adult males having been secured in the kitchen)--we conclude that most of the *MacDonald* factors, along with other important considerations, based on substantiated facts found by the district court, lead to the conclusion that exigent circumstances justified the Officers' warrantless return to the second bedroom.

We begin with fact that the Officers, having lawfully entered the apartment with a warrant to arrest Accilien, fortuitously saw drugs and a gun, with a chambered round, in plain**{2017 U.S. App. LEXIS 43}** view during their lawful protective sweep of the bedroom. **{858 F.3d 155}** Drug trafficking is plainly a serious crime, one often accompanied by violence, *see, e.g., United States v. Gaskin*, 364 F.3d 438, 457 (2d Cir.) ("guns are tools of the narcotics trade"), *cert. denied*, 544 U.S. 990, 125 S. Ct. 1878, 161 L. Ed. 2d 751 (2004). There was a clear need for the Officers to remain in the apartment long enough to ensure, *inter alia*, that persons engaged in drug trafficking were not released.

There were four adult males in the small apartment when the Officers arrived around 6:00 a.m. The living room, equipped with a mattress on the floor or a pull-out couch, was occupied by the woman and children. (*See* H.Tr. 72.) The bedroom in which the drugs and gun were found contained not only a bed but an inflatable mattress. (*See id.* at 48.) There was thus probable cause to believe that the drugs and gun were owned by one of the four men; whoever owned those items was subject to immediate arrest; all four men were suspects.

Although at the time of the Officers' reentry into the by-then-empty bedroom there was no reason to believe that any of the suspects were armed, it was objectively reasonable to fear that if the owner of the drugs and gun were not identified and were allowed to depart he would likely attempt to escape apprehension**{2017 U.S. App. LEXIS 44}** or further detection. In the interest of protecting the public,

it was the responsibility of law enforcement not only to seize the drugs and the gun, but also to determine who owned or possessed them and to place that person under arrest.

No doubt the Officers could have sought (and obtained) a search warrant for the apartment; but a search would likely not tell the Officers who owned the drugs and gun. The purpose of their reentry into the bedroom was not to search for additional items that might be found there--a task that could have been performed without bringing Accilien or any of the other suspects into the room--but rather to seek information as to who owned the drugs and the gun. *See Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *4 (the Officers "brought Accilien into the bedroom and asked him to identify the other people in the apartment"); *Delva II*, 13 F.Supp.3d at 274 (the Officers "stepped into the bedroom with Accilien to ask him who the other individuals were and to whom the items in the closet belonged").

Thus, the Officers reasonably sought to determine expeditiously whom, if anyone other than Accilien, they should arrest. (*See also* H.Tr. 84 (the Officers spent some 15-20 minutes "running names of people that were in the apartment"--thereby "discover[ing]**{2017 U.S. App. LEXIS 45}** an outstanding warrant for **David Delva**").)

Perhaps, instead of questioning Accilien as to the identities of the other three men and as to who owned the drugs and gun, the Officers could have taken all four men to the police station for questioning. But mere presence at a place in which there are illegal drugs is not a crime. Certainly it was less intrusive for the Officers to attempt to find out immediately whom, other than Accilien, to arrest and whom not to. Further, given the possibility that the drugs and gun did not belong to Accilien, it was reasonable for the Officers to attempt to have him name the owner outside of the presence of the other men, in order to facilitate Accilien's candor and reduce the possibility of intimidation by the owner. But in order to interview Accilien beyond the hearing of the other three men, the Officers were forced to go somewhere other than the kitchen.

The apartment was very small, about 500 square feet in total, consisting of the living room occupied by the woman and children, the kitchen, the bathroom, and the bedroom. There was no door between the kitchen entrance to the apartment and **{858 F.3d 156}** the landing at the top of the stairs; there was no anteroom,**{2017 U.S. App. LEXIS 46}** or any hallway, in which the Officers could question Accilien privately. In these circumstances, given the need to determine which of the other men in the apartment--if any of them should be arrested, the Officers' decision to return to the bedroom, the only unoccupied room other than the bathroom, in order simply to question Accilien, or to question any of the other men individually, in order to determine whom to arrest for possession of the drugs and the gun, was objectively reasonable. After Accilien identified Delva and stated that those items belonged to Delva, the Officers arrested Delva.

In sum, the law enforcement interest in promptly questioning Accilien in private while the other three men were still being detained was strong, and the return to the empty bedroom for that purpose was a reasonable and minimal intrusion into the residents' privacy. Although the government did not argue exigent circumstances in the district court, we conclude that the facts found by the district court, and substantiated by the evidence, provide ample basis for application of the exigent circumstances exception to the Officers' reentry into the bedroom. In these circumstances, as we see no error**{2017 U.S. App. LEXIS 47}** in the district court's finding that the cellphone and letters were observed in that room in plain view, we conclude that the record required the denial of Delva's motions to suppress the cellphone and the letters.

B. *Other Contentions*

Delva also raises challenges to certain of the court's evidentiary, procedural, and sentencing

decisions.

1. *FV's Testimony that She Was Raped*

Delva contends that the district court abused its discretion in permitting FV to testify that during the kidnapping/robbery she was raped. He contends that even if FV was raped, the government failed to prove that he was a participant or that the rape was reasonably foreseeable to him, and therefore her testimony about the rape was irrelevant and highly prejudicial. The district court denied Delva's *in limine* motion to exclude that evidence, noting that Delva was charged not only with the substantive offenses of kidnapping and robbery but also with conspiring to commit those offenses; the court concluded that the rape evidence was relevant and, given the circumstances of the crimes, was not unfairly prejudicial. *See United States v. Delva*, No. 12 Cr. 802 (KBF), 2014 U.S. Dist. LEXIS 126370, 2014 WL 4460360, at *6-*7 (S.D.N.Y. Sept. 10, 2014) ("*Delva III*"). "We review a district court's evidentiary rulings under a deferential abuse of discretion**{2017 U.S. App. LEXIS 48}** standard, and we will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015) (internal quotation marks omitted).

FV testified that for about a day, she managed to resist the intruders' orders to summon MV to her apartment and that she gave in only after three of them, in close succession, raped her. Her testimony was directly relevant to the manner in which the robbery succeeded: "[T]hreatened or actual use of force or violence" was an element in the crimes. *Delva III*, 2014 U.S. Dist. LEXIS 126370, 2014 WL 4460360, at *6.

Further, although Delva contends that there was no evidence to show that he could have anticipated that his codefendants would commit rape, Accilien testified that Jean Philippe instructed Accilien to bring Delva to FV's apartment specifically because Delva was experienced in committing robberies--evidence that the court found had a tendency to show a "relationship of trust between the defendant and **{858 F.3d 157}** his coconspirators," 2014 U.S. Dist. LEXIS 126370, [WL] at *8. We cannot conclude that there was error, much less "manifest" error, in the district court's evidentiary ruling.

We also reject Delva's related contention that his attorney's decision not to cross-examine FV and attempt to shake her testimony that she had in fact been**{2017 U.S. App. LEXIS 49}** raped, violated his Sixth Amendment right to effective assistance of counsel. In order to prevail on such a claim, a defendant must show, *inter alia*, "that counsel's representation fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *id.* at 690, and counsel's obligation to consult with his client with regard to "important decisions" "does not require counsel to obtain the defendant's consent to every tactical decision," *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) (internal quotation marks omitted).

Delva did not and does not claim that his attorney had not conducted a sufficient investigation. His disagreement with counsel, aired to the district court at the start of trial, was an objection as to trial strategy. Delva stated, "Really, basically the whole thing was just about disagreements about his method and the fact that he was going one way that I'd agreed with before. Then at the end, that he changed at the last moment." (Trial Transcript ("T.Tr.") 49.) Counsel stated that after extended consideration, he had made a "strategic decision." (*Id.*) And in his summation to the jury, he argued that as FV was**{2017 U.S. App. LEXIS 50}** blindfolded and unable to say which three men had raped her, and that given that at one point only Cole, Jean Philippe, and Accilien were there, it was reasonable to infer that those were the three men, not including Delva, who raped her. (*See id.* at

1255-56.)

Given the evidence as to the manner in which the kidnapping/robbery was committed, we conclude that counsel's strategic decision to make that argument, rather than to attempt to shake FV's testimony that she had in fact been raped, did not fall below an objectively acceptable level of competence.

2. *The Replacement of Juror No. 7*

Delva also complains of the district court's removal of one of the jurors late in the trial. We conclude that the circumstances, which we set out below, warranted the juror's removal.

After the jury retired to deliberate, the district court pointed out that during Delva's closing argument, Juror No. 7 had acted in an "unusual" manner by frequently nodding her head. (T.Tr. 1363.) That night, the government ran a background check on the juror and reported that she appeared to have a criminal record, including a felony conviction for possession of crack cocaine. The court's voir dire had included the question "Have any of**{2017 U.S. App. LEXIS 51}** you been charged with a crime or been the subject of any government investigation or accusation?" and the juror had not responded affirmatively. Over Delva's objection, the court decided to question Juror No. 7 to determine whether she in fact had a criminal record and, if so, why she had failed to disclose that fact on her juror questionnaire or during voir dire. The court conducted two such rounds of questioning.

In the first, when asked at the outset how many times she had been arrested, Juror No. 7 responded "Once." (T.Tr. 1383.) Upon further questioning, she again stated that she had been arrested just **{858 F.3d 158}** once (*see id.*); but then she admitted that she had been imprisoned for a felony conviction and that she had two additional arrests (*see id.* at 1384-85). She stated that she did not disclose the felony conviction on her juror questionnaire or during voir dire because her civil rights had been restored and that she did not disclose the other two arrests because the cases were old. The court briefly sent the juror out of the courtroom; the government argued that the juror was still being untruthful because her criminal record revealed that she had actually been arrested 10 times from 1986 through**{2017 U.S. App. LEXIS 52}** 2010.

In the second round of questioning, the court proceeded, date by date, to ask Juror No. 7 whether she had been arrested. She admitted being arrested on three dates (*see id.* at 1391-93), including once for her narcotics "[d]ealing" felony (*id.* at 1393). As to each of the other seven dates, she denied, or stated that she had no recollection of, being arrested.

The court found that "[Juror No. 7] was being decidedly untruthful" (*id.* at 1395), and it concluded that there was a strong possibility of bias:

> Well, we've gone from one to three arrests, and we're getting I think varying and shifting stories about the arrests each time. I don't think we have a clear answer on whether or not she recalls or doesn't recall earlier arrests. . . . I think that she's embarrassed about some of the convictions, I think that she's not wanted to talk about them because she finds them embarrassing, but I believe that they occurred and I think, based upon how she was responding when I was going through the other dates, I would bet that if we fingerprinted her as [counsel] suggests, that we would find that the others occurred as well. I certainly believe that the three are sufficient. We've gotten several different answers now on these arrests, and**{2017 U.S. App. LEXIS 53}** that concerns me.
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> . . . .
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> The court is going to dismiss juror no. 7, based upon juror misconduct, based upon the court's determination that there are a number of instances where the juror has been untruthful with the

court, starting potentially with the questionnaire, though there's a possible explanation for that, but certainly in the voir dire process and then most recently during the questioning this morning before the court.(T.Tr. 1394-97.) Juror No. 7 was replaced with an alternate and the reconstituted jury was instructed to begin deliberations anew.

The trial judge is authorized to remove a juror for "good cause" after deliberations have begun and to replace that juror with an alternate, so long as the reconstituted jury is instructed to begin deliberations anew. *See, e.g., United States v. Yousef*, 327 F.3d 56, 160 n.72 (2d Cir.), *cert. denied*, 540 U.S. 933, 124 S. Ct. 353, 157 L. Ed. 2d 241 (2003); *see also* Fed. R. Crim. P. 24(c)(3) and Advisory Committee Note (1999). "'Good cause' encompasses a variety of problems that may arise with respect to the jury, including . . . misconduct." *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007). Misconduct includes lying on voir dire. *See, e.g., United States v. Parse*, 789 F.3d 83, 111 (2d Cir. 2015).

> *Voir dire* examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in**{2017 U.S. App. LEXIS 54}** the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. *The necessity **{858 F.3d 159}** of truthful answers by prospective jurors* if this process is to serve its purpose *is obvious.McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (emphases added). The trial judge's decision to replace a juror for good cause is reviewable for abuse of discretion. *See, e.g., United States v. Spruill*, 808 F.3d 585, 592 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 407, 196 L. Ed. 2d 297 (2016); *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994), *cert. denied*, 513 U.S. 1092, 115 S. Ct. 756, 130 L. Ed. 2d 655 (1995).

We see no abuse of discretion here in the procedures adopted by the district court or in its ultimate decision to excuse Juror No. 7. Whether or not Juror No. 7's civil rights had been restored, she had no right to fail to respond truthfully to the juror questionnaire or the court's questions on voir dire. Her lack of candor about her criminal record at the pretrial stage, which the court found continued in response to the court's direct inquiry, gave the court ample cause to dismiss Juror No. 7.

3. *Sentencing*

The presentence report ("PSR") prepared on Delva calculated that his base offense level under the advisory Sentencing Guidelines ("Guidelines") was 32, *see* Guidelines § 2A4.1(a); that level was increased by six steps because**{2017 U.S. App. LEXIS 55}** a ransom demand was made, *see id.* § 2A4.1(b)(1); plus two steps because the victims sustained serious bodily injury, *see id.* § 2A4.1(b)(2)(B); plus six steps because a victim was sexually exploited during the commission of the kidnapping/robbery, *see id.* § 2A4.1(b)(5); plus one step for the grouping of his offenses, *see id.* § 3D1.4, bringing the total offense level to 47, which was reduced to the Guidelines maximum of 43. The PSR found that Delva's criminal history category was IV. The advisory-Guidelines-recommended range of imprisonment was thus life imprisonment for the conspiracies to commit kidnapping, robbery, and narcotics distribution, and for being a felon in possession of a firearm, plus a mandatory consecutive five-year term for possession of a firearm in furtherance of the narcotics conspiracy.

The district court found that Delva's criminal history category should be III instead of IV but otherwise adopted the factual findings in the PSR. The court found by a preponderance of the evidence that Delva was present at various times at the scene of the kidnapping/robbery and assisted in those crimes. It concluded that Delva's advisory-Guidelines-recommended range of imprisonment, despite the lower criminal history category,**{2017 U.S. App. LEXIS 56}** remained life imprisonment plus five

years.

Cole and Jean Philippe, for their roles in the kidnapping/robbery, had been sentenced to prison terms of life plus seven years. The court found that Delva's conduct was somewhat less heinous, and it sentenced Delva to a below-Guidelines prison term of 360 months.

On appeal, Delva challenges his sentence as unduly harsh, arguing principally that the court impermissibly sentenced him largely for conduct of which he was acquitted, *i.e.*, the substantive offenses of kidnapping, robbery, and brandishing a firearm in furtherance of the kidnapping/robbery. He argues that MV was unable to identify him as one of the perpetrators of the kidnapping/robbery, that he presented evidence that he was elsewhere during the period in which those crimes were committed, and that the court's finding as to his presence in FV's apartment at various times during the kidnapping/robbery is erroneous in light of his acquittals **{858 F.3d 160}** by the jury on those substantive counts. We are unpersuaded.

A district court commits a procedural error if it bases its sentence on a clearly erroneous finding of fact. *See, e.g.*, *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc), *cert. denied*, 556 U.S. 1268, 129 S. Ct. 2735, 174 L. Ed. 2d 247 (2009). It commits substantive error if its "decision**{2017 U.S. App. LEXIS 57}** cannot be located within the range of permissible decisions." *Id.* at 189 (internal quotation marks omitted).

Because the quantum of proof required for a verdict of guilt is higher than the quantum required for sentencing, it is established that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997); *see also United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005), *cert. denied*, 547 U.S. 1060, 126 S. Ct. 1665, 164 L. Ed. 2d 405 (2006); *United States v. Miller*, 116 F.3d 641, 685 (2d Cir. 1997) (not error for the sentencing court to rely on evidence at trial that the jury considered insufficient to establish a factual proposition beyond a reasonable doubt, where the court itself finds that proposition established by a preponderance), *cert. denied*, 524 U.S. 905, 118 S. Ct. 2063, 141 L. Ed. 2d 140 (1998). Although Delva asks us not to follow *Watts*, we are bound by that decision.

Nor are we entitled, as Delva urges, to overturn the district court's finding that he was, at various points, present at the kidnapping/robbery. Although Delva argues that "a far more reasonable view of the evidence" would be "that Delva was not present" (Delva brief on appeal at 69), it is beyond cavil that credibility assessments by the judge who presided over the trial are entitled to considerable**{2017 U.S. App. LEXIS 58}** deference, *see, e.g.*, *Gall v. United States*, 552 U.S. 38, 51-52, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *United States v. Norman*, 776 F.3d 67, 76-77 (2d Cir.), *cert. denied*, 135 S. Ct. 2333, 191 L. Ed. 2d 995 (2015), and that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous," *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). Plainly, there was evidence to support the district court's finding that Delva was present at the kidnapping/robbery; Delva acknowledges that the court relied on trial testimony by "Accilien [and] the government's DNA evidence" (Delva brief on appeal at 69). We cannot conclude that the district court's findings are clearly erroneous or that its ultimate decision was beyond the range of permissible decisions.

CONCLUSION

We have considered all of Delva's arguments on this appeal and have found in them no basis for reversal. The judgment is affirmed.

Dissent

Dissent by: DENNIS JACOBS

I agree with the majority's analysis on all issues other than the Fourth Amendment holding, which is of course the heart of the matter. As to the holding that exigent circumstances allowed the survey of a bedroom in which the police spotted things in plain view, I would remand for the district court to consider it in the first instance. The government, which bears the burden of proof, did not assert exigent circumstances in the district court, or here; and Delva's counsel has**{2017 U.S. App. LEXIS 59}** not had a chance to say a word about it. Because I would remand rather than affirm, I respectfully dissent.

{858 F.3d 161} The Fourth Amendment prohibits warrantless searches unless an exception applies. The exception for items in plain view is subject to a proviso: "law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." Kentucky v. King, 563 U.S. 452, 462-63, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011). The cellphone and the letters that Delva sought to suppress came into plain view when the police reentered a bedroom that had already been subject to a protective sweep. The question (not an easy one) is whether the officers violated the Fourth Amendment in arriving at the spot (the bedroom) from which they saw evidence in plain view.

The district court held that the officers were lawfully in the bedroom as part of a protective sweep. The majority opinion demonstrates why the protective sweep exception is inapplicable, and there is no reason for me to recapitulate it.

The majority opinion nevertheless affirms on the ground of a different Fourth Amendment exception: exigent circumstances. In a nutshell, the majority opinion treats as exigency the need to find a private space to interview a suspect in a small**{2017 U.S. App. LEXIS 60}** and crowded apartment with no front door. The evidence was spotted when the police took Accilien into the only separate bedroom in the place.

The exigent circumstances exception is a limited one. Welsh v. Wisconsin, 466 U.S. 740, 749, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). The Supreme Court has recognized exigent circumstances where, for instance, police "need to provide urgent aid," or where they are "in hot pursuit of a fleeing suspect," or where they "fear the imminent destruction of evidence." Birchfield v. North Dakota, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016). And importantly, "'the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.'" Harris v. O?Hare, 770 F.3d 224, 234 (2d Cir. 2014), as amended (Nov. 24, 2014) (quoting Welsh, 466 U.S. at 749-50).

The government did not argue exigent circumstances in the district court; the district court did not rule on exigent circumstances; and the government did not argue exigent circumstances on this appeal. It follows that Delva's counsel has not had an opportunity to argue the point, which has become crucial. It is not as though there would have been nothing for Delva's counsel to say: no published circuit opinion has found exigent circumstances in a case analogous to this one; and even if the bedroom was the only space for a private interrogation inside the apartment,**{2017 U.S. App. LEXIS 61}** an alternative venue may have been the street or a patrol car.

The government has a "heavy burden" to establish exigent circumstances, Harris, 770 F.3d at 234; the question is "heavily fact dependent," United States v. Andino, 768 F.3d 94, 98 (2d Cir. 2014); and we lack the benefit of a ruling by the district court or of briefing by the parties.

Rather than affirm, I would remand this case to the district court for briefing and for a finding as to whether the exigent circumstances exception (or some other Fourth Amendment exception) applies.

APPENDIX E

DAVID DELVA, Movant, -v- UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2020 U.S. Dist. LEXIS 80844
12-CR-802-4 (JMF),19-CV-3623 (JMF)
May 7, 2020, Decided
May 7, 2020, Filed

Editorial Information: Subsequent History

Reconsideration denied by **Delva v. United States**, 2020 U.S. Dist. LEXIS 156524 (S.D.N.Y., Aug. 28, 2020)

Editorial Information: Prior History

United States v. Cole, 2014 U.S. Dist. LEXIS 14976 (S.D.N.Y., Jan. 27, 2014)

Counsel **{2020 U.S. Dist. LEXIS 1}**For U.S. Attorneys (1:12cr802): Justina Louise Geraci, LEAD ATTORNEY, United States Attorney Office, SDNY, New York, NY USA; Kedar Sanjay Bhatia, U.S. Attorney's Office, S.D.N.Y. (SA-CR), New York, NY USA; Michael McGinnis, United States Attorney's Office For The Southern District, New York, NY USA; Parvin Daphne Moyne, U.S. Attorney's Office, SDNY (St Andw's), New York, NY USA; Timothy Donald Sini, United States Attorney Office, SDNY, New York, NY USA.

David Delva, Plaintiff (1:19-cv-03623-JMF), Pro se, Coleman, FL.

For United States of America, Defendant (1:19-cv-03623-JMF): Kedar Sanjay Bhatia, LEAD ATTORNEY, U.S. Attorney's Office, S.D.N.Y. (SA-CR), New York, NY.

Judges: JESSE M. FURMAN, United States District Judge.

Opinion

Opinion by: JESSE M. FURMAN

Opinion

JESSE M. FURMAN, United States District Judge:

OPINION AND ORDER

David Delva, who was convicted following a jury trial and sentenced by former District Judge Katherine B. Forrest to 360 months' imprisonment, moves, without counsel, to "vacate, set aside, or correct" his sentence pursuant to 28 U.S.C. § 2255. *See* ECF No. 289.1 His primary arguments are that his trial counsel and appellate counsel were constitutionally ineffective in various ways. In addition, however, he contends that**{2020 U.S. Dist. LEXIS 2}** his conviction under 18 U.S.C. § 924(c) should be vacated because the statute is unconstitutionally vague and that his conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), should be vacated in light of the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019). For the reasons that follow, Delva's motion is denied in full.

BACKGROUND

The relevant facts can be recounted briefly. In 2013, Delva was charged for his role in a 2012 kidnapping and robbery involving a female and male victim. At the time of Delva's arrest, officers performed a protective sweep of his apartment, during which they seized drugs and a firearm from his bedroom. *See United States v. Delva*, No. 12-CR-802 (KBF), 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *7 (S.D.N.Y. Jan. 27, 2014) ("*Delva I*"). During the same arrest, officers later reentered Delva's bedroom and seized additional items, including a cellphone and letters addressed to his uncle, Gregory Accilien (the "Accilien letters"). *See United States v. Delva*, 13 F. Supp. 3d 269, 274 (S.D.N.Y. 2014) ("*Delva II*"). Prior to trial, Delva moved to suppress all of these items. Judge Forrest denied this motion and held that these items were seized during a valid protective sweep. *See Delva I*, 2014 U.S. Dist. LEXIS 14930, 2014 WL 465149, at *7; *Delva II*, 13 F. Supp. 3d at 277 & n.4.

On September 18, 2014, Delva was convicted by a jury of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c); conspiracy**{2020 U.S. Dist. LEXIS 3}** to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841, 846; possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), 924(c)(1)(C)(i); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). ECF No. 256. Delva appealed, primarily challenging Judge Forrest's denial of his suppression motion. On June 1, 2017, the Second Circuit affirmed. *See United States v. Delva*, 858 F.3d 135 (2d Cir. 2017) ("*Delva III*"). To the extent relevant here, the Court of Appeals disagreed with Judge Forrest's finding that the seizures were made pursuant to a lawful protective sweep. *Id.* at 152. Nevertheless, the panel found that the seizures were justified by exigent circumstances. *Id.* at 156. On March 19, 2018, the Supreme Court denied certiorari. ***Delva v. United States***, 138 S. Ct. 1309, 200 L. Ed. 2d 491 (2018).

DISCUSSION

Section 2255 permits a prisoner in federal custody to challenge his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Section 2255 requires a hearing unless the "files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also Pham v. United States*, 317 F.3d 178, 184 (2d Cir. 2003). Thus, no hearing is required where the petitioner's allegations are "vague, conclusory, or palpably incredible." *Machibroda v. United States*, 368 U.S. 487, 495, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962). To warrant a hearing, the petitioner "must set forth specific**{2020 U.S. Dist. LEXIS 4}** facts supported by competent evidence, raising detailed and controverted issues of fact that, if proved at a hearing, would entitle him to relief." *Gonzalez v. United States*, 722 F.3d 118, 131 (2d Cir. 2013).

Here, as noted, the bulk of Delva's claims are for ineffective assistance of counsel by both his trial counsel and his counsel on appeal. In addition, he contests his Section 924(c) conviction on vagueness grounds. Finally, he challenges his Section 922(g)(1) conviction in light of the Supreme Court's decision in *Rehaif*. The Court will address these claims in turn.

A. Ineffective Assistance of Counsel Claims

The majority of Delva's claims are for ineffective assistance of counsel. To prevail on these claims under the *Strickland* standard, the petitioner must prove that (1) counsel's performance was deficient, and (2) there was prejudice resulting from that deficient performance. *Gueits v. Kirkpatrick*, 612 F.3d 118, 122 (2d Cir. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first prong of that test, the petitioner must show that "counsel

upon by the district court or briefed by the Government. *See* ECF No. 307; 19-CV-3623, ECF Nos. 21, 22. This argument fails because it is clearly established that the Court of Appeals can "affirm the denial of [a] suppression motion on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely," *United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995) (internal quotation marks omitted), and the "[f]ailure to make a meritless argument does not amount to ineffective assistance," *United States v. Regalado*, 518 F.3d 143, 149 n.3 (2d Cir. 2008) (per curiam) (internal quotation marks omitted).

Second, echoing one of the arguments he made with respect to trial counsel, Delva claims that appellate counsel should have affirmatively argued that there were no exigent circumstances in the direct appeal brief. This argument fails for the same reason: because "reviewing courts should not second guess the reasonable professional judgments of appellate counsel as to the most promising appeal issues." *Franza v. Stinson*, 58 F. Supp. 2d 124, 135 (S.D.N.Y. 1999). Here, it was objectively reasonable for appellate counsel to focus his attention on the issues that were contested at the trial level and to omit the exigent circumstances argument.

Finally, Delva claims that appellate counsel was deficient**{2020 U.S. Dist. LEXIS 12}** for not arguing that *Nelson v. Colorado*, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017), precluded the district court from considering acquitted conduct during sentencing. It is well established, however, that judges can consider acquitted conduct during sentencing, if the conduct was proved by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam). Delva's contention that *Watts* was effectively overruled by *Nelson* has been rejected by the Second Circuit. *See, e.g., United States v. Swartz*, 758 F. App'x 108, 111-12 & n.4 (2d Cir. 2018) (summary order) (finding *Nelson* to be inapplicable to the issue of relevant conduct at sentencing).

B. Vagueness Challenge

Next, Delva challenges his conviction under 18 U.S.C. § 924(c) on vagueness grounds. Delva cites *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018), and *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019)2 - cases in which the Supreme Court struck down statutory provisions for vagueness - but those cases are inapposite because they dealt with residual clauses defining "crimes of violence." Here, Delva was charged under Section 924(c) for possession of a firearm "in relation to any . . . drug trafficking crime" as defined by Section 924(c)(2). The definition of "drug trafficking crime" in this statute was not at issue in those cases and was not invalidated as unconstitutionally vague. *See Jimenez v. United States*, Nos. 15-CV-4653 (AKH), 13-CR-58 (AKH), 2019 U.S. Dist. LEXIS 181637, 2019 WL 5306976, at *2 (S.D.N.Y. Oct. 21, 2019) ("Although, in light of *Davis* . . . a Hobbs Act robbery is no longer a valid**{2020 U.S. Dist. LEXIS 13}** § 924(c) predicate offense, drug trafficking remains a valid predicate offense"); *Hernandez v. United States*, No. 17-CV-4582 (RBK), 2019 U.S. Dist. LEXIS 166206, 2019 WL 4727903, at *3 (D.N.J. Sept. 27, 2019) (rejecting vagueness challenge because the petitioner's conviction "was based solely upon a drug trafficking offense"). Thus, Delva's vagueness claim is without merit.

C. *Rehaif Claims*

Finally, Delva filed a slew of motions to amend his petition to include new claims in light of *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019). *See* ECF Nos. 298, 303, 305; 19-CV-3623, ECF Nos. 12, 18. In *Rehaif*, the Supreme Court held that, in a prosecution under 18 U.S.C. § 922(g), the prosecution must prove the defendant's knowledge that he belonged to the category of persons for whom it is unlawful to possess a firearm (the status element), as well as his knowledge that he possessed the firearm itself (the possession element). 139 S. Ct. at 2200.3

First, Delva contends that his trial counsel was ineffective for failing to challenge his indictment on

the ground that it did not allege that he knew he had been convicted of a felony at the time of the firearm possession. The Second Circuit has been clear, however, that an indictment's failure to allege the *Rehaif* knowledge element "does not mean that the indictment fails to allege a federal offense in the sense that would speak to the district court's**{2020 U.S. Dist. LEXIS 14}** power to hear the case." *United States v. Balde*, 943 F.3d 73, 91 (2d Cir. 2019). While the Court noted that such an indictment "may be deficient in some other way," *id.*, Delva has not shown any prejudice from the indictment's omission in this case or from his counsel's failure to raise the issue. *Cf. United States v. Miller*, No. 16-3734-cr, 807 Fed. Appx. 90, 2020 U.S. App. LEXIS 10374, 2020 WL 1638459, at *1 (2d Cir. Apr. 2, 2020) (noting that "indictments suffice even if they do little more than track the language of the statute" (internal quotation marks and ellipsis omitted)). Thus, even assuming *arguendo* that Delva's attorney's conduct was objectively unreasonable in this regard - a dubious proposition - Delva's claim must be rejected.

Next, Delva contends that his conviction under 18 U.S.C. § 922(g) is invalid in light of *Rehaif*. In short, and construing his *pro se* petition liberally, Delva argues that, because the Government did not prove that he knew of his felon status, and the trial judge instructed the jury that it did not need to find such knowledge, his conviction should be vacated. *See* ECF No. 216, at 1343. Because this issue was not raised at trial or during his direct appeal, however, Delva must show either cause and actual prejudice or actual innocence in order to overcome the procedural default. *See United States v. Frady*, 456 U.S. 152, 167, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). Delva fails to satisfy either standard.

First,**{2020 U.S. Dist. LEXIS 15}** whether or not Delva can show cause, he cannot show actual prejudice. On collateral review, the Court assesses erroneous jury instructions "in the total context of the events at trial," in order to determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Frady*, 456 U.S. at 169 (internal quotation marks omitted). That is not the case where, as here, the record "removes any doubt that [the defendant] was aware of his membership in § 922(g)(1)'s class." *See United States v. Miller*, 954 F.3d 551, 560 (2d Cir. 2020).4 In *Miller*, the Court held that jury instructions were improper under *Rehaif*, but - applying the plain error standard - affirmed on the ground that the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" because the defendant had stipulated to being a felon, had been sentenced to more than a year in prison, and had served more than a year in prison. *Id.* Under those circumstances, the Court concluded that *accepting* the defendant's *Rehaif* argument would "seriously affect the fairness, integrity, or public reputation of judicial proceedings," as the**{2020 U.S. Dist. LEXIS 16}** Court had "no doubt that, had the *Rehaif* issue been foreseen by the district court, [the defendant] would have stipulated to knowledge of his felon status," as well. *Id.* at 559-60. Because he raises the issue on collateral review, Delva is subject not to the plain error standard, but to the even "more demanding cause and prejudice analysis." *Whitley v. United States*, Nos. 16-CV-3548 (NRB), 04-CR-1381 (NRB), 2020 U.S. Dist. LEXIS 71353, 2020 WL 1940897, at *7 (S.D.N.Y. Apr. 22, 2020). It follows, *a fortiori*, that Delva's arguments fall short. Like the defendant in *Miller*, Delva stipulated to being a felon, *see* ECF No. 214, at 1036, and his extensive prior criminal history removes any reasonable doubt that he knew he was a felon when he possessed the firearm, *see* ECF No. 300, at 2 n.1 (describing a conviction punishable by five years in prison); ECF No. 255, at 11 (noting Delva's criminal history score of eight); Presentence Report at 12-14 (listing over half a dozen convictions, including at least one other punishable by more than a year in prison).

Nor can Delva meet the standard for actual innocence, which requires proof that "in light of new evidence, it is more likely than not that no reasonable juror would have found [him] guilty

beyond{**2020 U.S. Dist. LEXIS 17**} a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (internal quotation marks omitted). The only evidence that Delva puts forth to show innocence is his own self-serving affidavit, which states that, at the time of the crime, he "did not know [he] was a felon." *See* ECF No. 305, at 5, 7. That is insufficient to establish actual innocence. *See Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (stating that "motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations"); *see also id.* at 423 (O'Connor, J., concurring) (discussing the need to view affidavits filed "at the 11th hour" with "a fair degree of skepticism"); *see also Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) ("To be credible, [a claim of actual innocence] requires petitioner to support his allegations . . . with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."); *cf. Krasniqi v. United States*, 195 F. Supp. 3d 621, 634 (S.D.N.Y. 2016) (noting that "self-serving, uncorroborated" affidavits were not sufficient to establish an ineffective assistance of counsel claim). The fact that Delva entered into a stipulation regarding his previous conviction in light of his extensive criminal history further undermines{**2020 U.S. Dist. LEXIS 18**} his claim that he had no knowledge of his felon status at the time. *See Hughey v. United States*, No. 16-CV-184 (TH), 2019 U.S. Dist. LEXIS 153884, 2019 WL 4277401, at * 1 (E.D. Tex. Sept. 10, 2019) (denying a *Rehaif* claim in part because the defendant entered into a stipulation regarding his past felony); *United States v. Anderson*, No. 10-CR-0113 (LSC) (JHE), 2019 U.S. Dist. LEXIS 136413, 2019 WL 3806104, at *2 (N.D. Ala. July 26, 2019) (noting that a stipulation to three prior felonies "undermines any argument the government did not account for his knowledge he was a convicted felon").

CONCLUSION

The Court has reviewed all of Delva's remaining arguments and finds them to be without merit. Accordingly, and for reasons set forth above, Delva's motion is DENIED in its entirety.

Because Delva has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2). Furthermore, the Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and thus *in forma pauperis* status is denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

The Clerk of Court is directed to terminate 12-CR-802, ECF Nos. 289, 297, 298, 303, 305, and 307; to terminate 19-CV-3623, ECF Nos. 10, 12, 18, 21, and 22; to close 19-CV-3623; and to mail a copy of this Opinion and Order to Delva.

SO ORDERED.

Dated: May 7, 2020

New York, New York

/s/ Jesse M. Furman

JESSE M. FURMAN{**2020 U.S. Dist. LEXIS 19**}

United States District Judge

APPENDIX-F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID DELVA, Movant, -v- UNITED STATES OF AMERICA, Respondent.	12-CR-802-4 (JMF) 19-CV-3623 (JMF) ORDER

JESSE M. FURMAN, United States District Judge:

On May 7, 2020, the Court issued an Opinion and Order denying Petitioner David Delva's motion to "vacate, set aside, or correct" his sentence pursuant to 28 U.S.C. § 2255. Docket No. 12-CR-802-4, ECF No. 23. Delva now moves for reconsideration. *See* Docket No. 19-CV-3623, ECF No. 24. Delva presents no valid grounds for reconsideration, substantially for the reasons stated in the Government's opposition. *See* Docket No. 12-CR-802-4, ECF No. 312; Docket No. 19-CV-3623, ECF No. 30; *see also, e.g.*, *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("It is well-settled that [a motion for reconsideration] is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple. Rather, the standard for granting a . . . motion for reconsideration is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." (internal quotation marks, citations, ellipsis, and alterations omitted)). .Accordingly, Delva's motion for reconsideration is DENIED.

The Clerk of Court is directed to enter this Order on both Docket Nos. 12-CR-802-4 and 19-CV-3623, and to mail a copy of this Order to Mr. Delva.

SO ORDERED.

Dated: August 28, 2020
New York, New York

JESSE M. FURMAN
United States District Judge

Additional material from this filing is available in the Clerk's Office.