No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2018

DAVID DELVA,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner demonstrated below that the district court committed clear error in upholding the warrantless search of his bedroom. Nevertheless, the divided court of appeals affirmed the district court's denial of suppression based on its *sua sponte* determination that exigent circumstances justified the warrantless entry into petitioner's bedroom so that officers would have a private space to interview a witness, a novel and unprecedented application of the exigent circumstances doctrine. Because the government had never challenged petitioner's assertion in the district court that exigent circumstances were not present, and never even argued exigent circumstances in the court of appeals, the court of appeals should have deemed the issue both waived and then forfeited and reversed, as a number of court of appeals have found in similar circumstances. At a minimum, given the fact-intensive nature that an exigent circumstances determination entails the case should have been remanded to give petitioner an opportunity to demonstrate that in fact no exigent circumstances were present.

In addition, at trial petitioner was ultimately acquitted of all substantive charges. Nevertheless, petitioner's sentence was largely driven by that acquitted conduct. The court of appeals affirmed petitioner's sentence finding that it was bound by this Court's prior decision in *United States v. Watts*, 519 U.S. 148 (1997). Many have questioned whether *Watts* continues to survive this Court's more recent Sixth Amendment jurisprudence. Regardless of the determination on that issue, *Watts* continued vitality cannot be reconciled with this Court's recent decision in

*Nelson v. Colorado,* 137 S. Ct. 1249 (2017), which held that an acquittal restores the presumption of innocence and cannot be the basis for any penalty.

This case therefore raises two important questions for this Court's consideration:

1. Does a court of appeals commit error when it upholds a warrantless search on the basis of an exception as to which the government waived and forfeited its right to assert?
2. Is a sentence based on acquitted conduct inconsistent with the presumption of innocence restored by that acquittal, and the Fifth and Sixth Amendments?

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Delva,* 858 F.3d 135 (2d Cir. 2017) (Kearse, Winter, Circuit Judges) and (Jacobs, Circuit Judge, dissenting), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated September 12, 2017, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

## JURISDICTION

The judgment of the of United States Court of Appeals sought to be reviewed was entered on June 1, 2017, and the order of that court denying petitioner's petition for rehearing was entered on September 12, 2017. Justice Ginsburg granted petitioner's application to extend his time to file a petition for a writ of certiorari until February 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Const. amend. IV.

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

### U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

1. In October 2013, petitioner was indicted in the Southern District of New York in a multi-count indictment principally charging substantive and conspiracy offenses involving robbery and kidnapping and a substantive charge of brandishing a weapon. A14, A41-A50.[1]

There was no dispute at trial that a woman and a man were kidnapped over the 2012 Labor Day weekend in the Bronx, New York, and that the man, a drug dealer was assaulted and ultimately his apartment robbed by the kidnappers. There was also no dispute as to the identity of three of the kidnappers: Trevor Cole, Dominique Jean Philippe and Gregory Accilien.

Instead, the focus at petitioner's trial was what role, if any, petitioner had in that kidnapping and robbery. Petitioner, who put on an alibi defense claimed that he was not present in the Bronx during the events at issue but was instead in the Crown Heights section of Brooklyn celebrating at the Jamaica Day parade where he got drunk and he stayed in Brooklyn at a relative's house for several days thereafter recovering from his hangover. For the most part, the jury appears to have accepted petitioner's defense, acquitting petitioner of every substantive offense relating to the kidnapping and robbery. Instead, petitioner was convicted of only conspiracy offenses, and narcotics and weapons possession offenses arising after the kidnapping and robbery. Having acquitted petitioner of all substantive offenses relating to the kidnapping and robbery -- and based on questions during

[1] "A__" refers to the Appendix filed in Court of Appeals, "Doc# refers to documents contained on the district court's docket reprinted at A1-A40; "App. A" or "App. B" refers to the appendices accompanying this petition.

deliberations -- there was good reason to believe that the jury's conviction of petitioner for conspiracy was not for his participation in the actual kidnapping and robbery but rather for his alleged role in the aftermath of the kidnapping, i.e., its cover up and sharing in the proceeds.[2] Thus, evidence that related to the post-kidnapping and robbery conduct was critical. It was that evidence consisting of certain letters ("the Accilien letters") and petitioner's cell phone that was the subject of one of the most hotly contested issues below, and the primary issue on appeal, i.e., whether that evidence should have been suppressed because it was obtained in the course of a warrantless search.

The facts underlying the suppression stemmed from the following circumstances. At about 6:00 a.m. on June 4, 2013, approximately 10 Officers, led by Officers Deloren and Reynolds, went to a second-floor apartment at 832 South Oak Drive in the Bronx with a warrant to arrest Gregory Accilien for his role in the alleged robbery and kidnapping. App. A at 8. The officers knocked on the ground-floor outer door and identified themselves as police. *Id.* At that point one of the officers saw through the door's window a man believed to be Accilien starting to descend the stairs only to promptly retreat. *Id.* The officers then broke through the door and entered. *Id.* In the second-floor apartment -- which was approximately 500 square feet -- they found Accilien, a woman and two children, and three other men--including petitioner, who at that time was not a suspect in the

[2] During deliberations the jury requested a playback of a prison call between Philippe and Delva and an explanation as to what "'progress' means as used [in] Count One, second element . . . i.e., if a person learns of unlawful activity and a conspiracy surrounding it after the unlawful act, are they a co-conspirator?" A595.

kidnapping/robbery. *Id.* at 8-9. During the approximately first two minutes they were in the apartment, the agents had secured it, handcuffed the men and during that same time found a handgun and a white powdery substance believed to be narcotics, all of which was ostensibly in plain view. *Id.* at 9. The question raised on appeal surrounded events after the conclusion of that protective sweep.

According to Reynolds and Deloren after the apartment was secured they brought Accilien into the bedroom and asked him to identify the other people in the apartment; Accilien identified petitioner as his nephew and the closet in the bedroom where the gun and narcotics was found as belonging to petitioner. *Id.* at 11. Petitioner initially moved to suppress the gun and narcotics. The testimony during the suppression hearing revealed that the agents also seized two cellphones (one of which they later learned belonged to petitioner) and the Accilien Letters. According to the agents all of these items were in plain view. *Id.* at 10.

As a result of this testimony petitioner expanded his suppression motion, initially to include his cellphone and later the Accilien Letters. According to petitioner these items were seized during a warrantless general search and no exigent circumstances excused the lack of a warrant. Doc#95 at 5. The government did not contest petitioner's assertion that no exigent circumstances were present. Instead, the government's position was that these items were seized in plain view during "[d]uring a lawful protective sweep." App. A at 10. The district court adopted the government's position and denied the motion. *Id.* The district court conclusion came despite the fact that it had also found that the officers only noticed and seized the letter and two cell phones after the officers had already left the bedroom from the protective sweep and "at about the same time" that they had returned to question Accilien. *Id.* at 11.

In affirming the denial of Petitioner's suppression motion, the Majority agreed with petitioner that the district court committed clear error when it concluded that seizure of the cellphone and Accilien Letters was proper under the protective search doctrine; since at the time of the seizure the protective sweep had already finished. App. A at 16. Nevertheless, the Majority affirmed on an argument never made below: "exigent circumstances" consisting of the need to question Accilien regarding to whom the drugs and gun belonged justified the warrantless *reentry* into the bedroom, since 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 or further detection." *Id.* at 18. And, since there was a "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." *Id.* at 19.

> 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.

*Id.* The dissent, would have remanded for further fact-finding:

> 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, an alternative venue may have been the street or a patrol car.

App. A. at 23. Significantly, the Majority's conclusion that the letters and cellphone were found during the questioning of Accilien was by no means certain to even the district court. Thus, the district court noted that the discovery of the letters occurred not during the questioning of Accilien but "[a]t about the same time" as the questioning of Accilien. *Id.* at 11. In fact, the agent testified that it had been discovered during the course of a "general search." A140.[3]

2. As noted previously, petitioner was acquitted of the substantive offenses of kidnapping, robbery, and brandishing a firearm in furtherance of the kidnapping/robbery. Nevertheless, in calculating petitioner's USSG range and sentencing him, the district court sentenced petitioner as if he had been convicted of those offenses. On appeal petitioner challenged the reasonableness of his sentence

[3] A140: "Q. Were you at that point when you recovered the letters conducting a general search? A. Yes."

which was based largely on conduct for which he had been acquitted. The court of appeals affirmed reasoning that under *Watts* "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." App. A at 22. And, although petitioner had asked the Second Circuit not to follow *Watts* "we are bound by that decision." App. A at 22.

Petitioner's rehearing petition was denied without explanation. App. B.

## REASONS FOR GRANTING THE WRIT

### I.

This Court has previously noted that the exceptions to the warrant requirement are "few in number and carefully delineated." *United States v. United States District Court,* 407 U.S. 297, 318 (1972). Had the Second Circuit upheld the warrantless search in this case after the issue was preserved and fully briefed, the result would still have been mistaken, but it would have at least been procedurally justifiable. Here, the grounds relied on by the Second Circuit were neither raised in the district court nor argued or briefed in the Court of Appeals. Instead, after concluding that the district court committed clear error in denying suppression based on a protective sweep, the Second Circuit *sua sponte* came up with its new rule of law, i.e., the need to enter a bedroom to interview a witness to quickly determine the ownership of seized contraband (narcotics and a gun) is an exigent circumstance obviating the need for a warrant, based on a record that never focused on that issue.

If correct, it would mean not only that "the Fourth Amendment is a dead letter in our Constitution" (*United States v. Askew*, 482 F.3d 532, 548 (D.C. Cir. 2007) (Edwards, CJ. dissenting));[4] but, would also unfairly award the government's conduct here, i.e., finding no waiver from the failure to challenge petitioner's assertion in the district court that exigent circumstances did not exist but then getting the benefit of petitioner's inability to rebut a contrary determination in the court of appeals. As this Court has observed:

> our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunals alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

*Sims v. Apfel*, 530 U.S. 103, 108-109 (2000) (*quoting Hormel v. Helvering*, 312 U.S. 552 (1941)).

In similar circumstances a number of appellate courts have found that the government's failure to independently raise as issue can result in a waiver or forfeiture of the issue and therefore an improper basis for upholding the denial of a suppression motion. Not only are the courts of appeals hopelessly divided on this issue, but the Second Circuit's decision is inconsistent with this Court's own precedent.

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[4] Ultimately, the *en banc* D.C. Circuit saw the wisdom of Judge Edwards' observations and resurrected the Fourth Amendment's protections. 529 F.3d 1119, 1122 (D.C. Cir. 2008) (Fourth Amendment is violated when following a *Terry* stop that produces nothing, officers conduct a warrantless search solely to facilitate its investigation).

In affirming petitioner's conviction the Second Circuit paid no regard to issues of waiver or forfeiture. Instead, the court simply noted that its reliance on exigent circumstances was proper since "[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," App. A at 16 (*citing Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir. 1995). *Headley* relied on this Court's decision in *Helvering v. Gowran*, 302 U.S. 238 (1937). *Gowran* a civil case decided 80 years ago and before the enactment of the Federal procedural rules does not support the weight the Second Circuit would assign to it. Indeed, *Gowran* is support for at least a remand in this case to permit petitioner to challenge the factual determination that exigent circumstances apply. *Gowran*, 302 U.S. at 247 ("If the Court of Appeals had accepted the theory, it would have been open to the taxpayer to urge, in view of the new issue presented, that he should have the opportunity to establish before the Board additional facts which would affect the result. *As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose*.") (emphasis added).

In contrast to Second Circuit's decision here, the Tenth Circuit in nearly similar circumstances refused to consider a ground (exigent circumstances) that had never been raised by the government. *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989). In *Maez*, the defendant moved to suppress evidence seized during a warrantless search. The district court denied the motion. The defendant appealed arguing that the search was improper based on *Payton v. New York*, 445 U.S. 573 (1980). The Tenth Circuit agreed. For the first time on appeal, the government argued that even if a warrant was necessary *Payton* permitted a warrantless search if exigent circumstances were present. According to the government, the record was sufficient to support such a claim. The Tenth Circuit however declined to consider the government's "belated" argument. In the view of the Tenth Circuit, a determination of "exigent circumstances" requires specific findings of fact which had never been made and it was not an appellate court's role to make such a determination. The Tenth Circuit found that such a result was compelled by this Court's prior precedents in both *Payton* and *Steagald v. United States,* 451 U.S. 204 (1981). Thus, in *Payton*, this Court noted that while exigent circumstances arguably existed it would not consider those grounds since none of the lower courts had relied on exigent circumstances to justify the search, and this Court would not make such a determination. 445 U.S. at 583. Similarly, in *Steagald*, the government argued for the first time on appeal that the record failed to show that the petitioner, arrested in a third party's house, had a reasonable expectation of privacy in the home. Because the claim had never been raised below, this Court declined to remand for factual findings on the issue:

> [T]he Government was initially entitled to defend against petitioner's charge of an unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry. *The Government, however, may lose its right to raise factual issues of this sort before this Court* when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, *or when it has failed to raise such questions in a timely fashion during the litigation. We conclude that this is such a*

> *case.* The Magistrate's report on petitioner's suppression motion, which was adopted by the District Court, characterized the issue as whether an arrest warrant was sufficient to justify the search of "the home of a third person" for the subject of the warrant. The Government never sought to correct this characterization on appeal, and instead acquiesced in the District Court's view of petitioner's Fourth Amendment claim.

451 U.S. at 209 (emphasis added). Finally, the Tenth Circuit noted that not only did the government never argue exigent circumstances but the defendant specifically argued below that exigent circumstances did not exist and the government never disputed that argument. Petitioner likewise specifically argued in the district court that exigent circumstances did not exist, and the government never challenged it.

Other circuits have also found waivers in similar circumstances. For example, in *United States v. Aguilera,* 591 Fed.Appx. 555 (9th Cir. 2015), the Ninth Circuit reversed the district court and granted suppression of evidence obtained by the warrantless search of a cell phone. The Ninth Circuit rejected the government's attempt to invoke the "independent source" doctrine for the first time on appeal based on its finding that such an argument was waived by the failure to raise it in the district court. The Ninth Circuit gave no consideration whether plain error should apply. *See also United States v. Stearns,* 597 F.3d 540, 551-52 and n.11 (3d Cir. 2010) (government's concession in the district court that the defendants had standing to assert Fourth Amendment claim constituted a "waiver" of that issue which the Court would not independently revisit and specifically rejecting the approach of the Second Circuit which held that "a reviewing court may revisit the issue even if no party raises it on appeal."); *United States v. Moss*, 963 F.2d 673 (4th Cir. 1992) (suppressing evidence and refusing to consider argument raised for the first time on appeal that the defendant had no reasonable expectation of privacy in the searched structure since the "general rule, for very good reasons, is that except in exceptional circumstances, 'a federal court does not consider an issue not passed upon below.'") (*quoting Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *United States v. Lightbourn,* 357 Fed.Appx. 259, 264 (11th Cir.2009) (although defendant was merely a passenger and not an owner of automobile and therefore lacked standing to challenge search the government "has waived the issue of standing by failing to raise the issue in the district court.").[5]

Still other circuits have found that a waiver could be excused where the government meets the plain error standard. For example, in *United States v. Noble,* 762 F.3d 509, 527-528 (6th Cir. 2014), the Sixth Circuit held that the district court erred when it refused to suppress evidence obtained from defendant Noble finding that officers lacked reasonable suspicion to stop and frisk a defendant. The court was then faced with an "awkward problem" since Noble's codefendants joined in that suppression motion but never explained "how the frisk of Noble impacts their Fourth Amendment rights." 762 F.3d at 526. Nevertheless, the Sixth Circuit reversed their convictions as well because the government never raised the standing

[5] The decisions by these appellate courts not to grant even plain error review is undouctedly based on the view that where an "issue is fact-intensive . . . plain error review is not appropriate." *United States v. Swptson,* 987 F.2d 1510 (10th Cir. 1983) (refusing to consider government's plain view argument raised for the first time on appeal).

issue in either the district court or in its opening appellate brief. Noting that the appellate courts were divided on this issue, the Sixth Circuit adopted the "majority view" that where the government fails to raise a ground for the denial of suppression in the district court the objection is subject to waiver. The Sixth Circuit also concluded, however, that once the issue is waived it can only raise it for the first time on appeal if it meets the plain error standard. Where the government fails to raise it in its opening brief, however, it forfeits the issue completely. Because the government failed to raise standing in its opening brief as well, the Sixth Circuit found the issue to have been forfeited and reversed the codefendant's conviction. *See also United States v. Gonzales,* 79 F.3d 413, 419 (5th Cir. 1996) (government forfeits Fourth Amendment standing argument where defendant provides facts in district court supporting an inference of standing and government did not raise the issue). Similarly, in *United States v. Marts,* 986 F.2d 1216, 1220 (8th Cir. 1993), the Eighth Circuit found that the government forfeited its right to raise the inevitable discovery doctrine where it failed to raise the issue in either the district court or on appeal. In affirming the district court's suppression of evidence based on a violation of the knock and announce rule, the majority refused to consider the dissent's suggestion that no suppression was required based on the inevitable discovery doctrine. In the view of the *Marts* majority:

> A case should not be reversed on appeal on a ground not raised in the district court or in this court. It is well settled that a party cannot shift its theory of recovery in this court, and the district court is not obligated to search the record for unraised issues ignored by counsel. . . . Here, it is significant that the government did not raise this issue below and has not raised this issue on appeal.

986 F.2d at 1220.

Finally, a few appellate courts have adopted a rule similar to that of the Second Circuit here, i.e., *sua sponte* considering an alternative ground for affirmance never raised by the government. Thus, in *United States v. Stotler*, 591 F.3d 935 (7th Cir. 2010), in a 2-1 decision the Seventh Circuit affirmed the district court's refusal to suppress evidence. On appeal the defendant argued that suppression of evidence seized from his truck was required under *Arizona v. Gant,* 556 U.S. 332 (2009) since he had no access to his truck at the time of his arrest. The Seventh Circuit agreed that *Gant* would have required suppression but it nonetheless affirmed either because search of the vehicle was permitted under the automobile exception or the evidence seized would have inevitably been discovered since in the Court's view "the evidence would have undoubtedly been discovered a little later." 591 F.3d at 940. In so holding, the majority rejected the argument made by the dissent that

> the government has never argued that admitting the evidence from this search was permissible based on inevitable discovery. It is the government's burden to prove the elements of this doctrine, *Nix. v. Williams,* 467 U.S. 431, 444 (1984); *United States v. Marrocco,* 578 F.3d 627, 638 (7th Cir. 2009), and it made no record on this point in the district court. Nor, as I have noted, has the

> government even bothered to argue inevitable discovery on appeal. It is axiomatic that arguments not raised on appeal are waived.

591 F.3d at 944. In *United States v. Bouffard,* 917 F.2d 673, 677 (1st Cir.1990), the First Circuit adopted a middle ground approach *sua sponte* considering a ground not only never raised by the government but one that it conceded did not apply, but remanding to the district court for further fact finding because "[c]onsiderations of fundamental fairness warrant remand in order to afford the defendant an opportunity to attempt to establish the requisite expectation of privacy." The Majority rejected the dissents view that considering issues not addressed by the parties "is not a proper role for our court to assume." *Id.* at 679.

There is good reason to reject the minority view of the Second Circuit and apply a waiver/forfeiture rule where the government fails to timely raise the issue. As this Court noted in *SEC v. Chenery,* 318 U.S. 80 (1943), "where the correctness of the lower court's decision depends upon a determination of fact which only a [fact-finder] could make but which has not been made, the appellate court cannot take the place of the [fact-finder]." 318 U.S. at 88. Here, the district court had no reason to consider whether exigent circumstances existed since it had already concluded, albeit mistakenly, that the items had been seized during a protective sweep. While the Majority attempted to cobble together facts which it found supported a finding of exigent circumstances it ignored numerous gaps in the record all of which would have undermined the Majority's conclusion and none of which were in the record:

1. Whether it was necessary to enter petitioner's Fourth Amendment protected bedroom to interview Accilien rather than to do so in a) the downstairs vestibule b) immediately outside the apartment, or c) a patrol car on the street.

2. Even assuming that it was necessary to make a warrantless entry into Delva's bedroom, whether a warrant permitting such entry could not have been obtained over the telephone?

3. Even assuming a telephone warrant could not have been obtained, whether the officers were limited to conducting the purportedly exigent interviews, or despite the fact that a protective sweep had already been performed were the officers also then permitted to stroll about the bedroom and survey it to examine everything that was supposedly in plain view?

4. Again assuming that such a plain-view survey was permitted was the Accilien letters found during the course of the interview, or as the agent testified during a subsequent "general search"?[6]

If any of these questions were answered in petitioner's favor, suppression would have been required and would likely resulted in the reversal of petitioner's conviction. The district court never considered these questions based on its conceded erroneous determination that the items was seized during a prior protective sweep. And, the Majority rather than give petitioner the opportunity to address these questions and elicit evidence in support of his arguments improperly and implicitly acted as a fact-finder rejecting them all. *Singelton v. Wulff*, 428 U.S.106, 119-121 (1976) (reversing judgment of court of appeals for improperly resolving issue against a party that never had the opportunity to do so; such an

[6] Indeed, at trial, at the suggestion of the district court the government withdrew its attempt to offer other items seized that day precisely because they had been seized that day during a general search. A441-442.

action is "an unacceptable exercise of its appellate jurisdiction" since "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." Even if a court can address issues not passed on below, it is only "where the proper resolution is beyond any doubt").

Petitioner's ability to vindicate his rights under the Fourth Amendment should not turn on the Circuit in which it was made. And, he was certainly entitled to an opportunity to address the validity and the applicability of the Court's newly-crafted exception before it was thrust upon him as a means of denying his constitutional right to be free from warrantless searchs. This important and recurring issue is ripe for this Court's review. U.S. Sup. Ct. Rule 10(a), 10(c).

## II.

This case presents another issue of extreme importance relating to the use of acquitted conduct at sentencing. In sentencing petitioner the district court stated that its sentencing determination was based on the view that petitioner was on the scene during the commission of the robbery and kidnapping. The district court's finding was directly contradicted by the jury's verdict acquitting petitioner of substantive robbery, substantive kidnapping and brandishing a firearm in connection with those offenses. Had the jury credited either Accilien (the government's principal witness) or the government's contested DNA evidence on which the district court so heavily relied it would have convicted petitioner of those offenses. Petitioner's USSG calculation without the acquitted conduct (Doc#249 at 36) produced a sentencing range of slightly more than 10 years a fraction of either the life sentence calculated under the guidelines by the district court or the 30 years actually imposed.

In *United States v. Watts*, 519 U.S. 148 (1997), this Court held 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." *Id.* at 157. The Court reasoned that an acquittal means only that conduct was not proved beyond a reasonable doubt. *Id.* at 155. In rejecting petitioner's challenge to his sentence the Second Circuit found that it was bound by *Watts*.

The holding in *Watts* cannot be reconciled with this Court's recent decision in *Nelson v. Colorado,* 137 S. Ct. 1249 (2017). In *Nelson,* this Court held that reversal of a conviction by an appellate court on either direct or collateral review entitles a defendant to reimbursement by the state for any restitution or fine previously paid. Under Colorado's Exoneration Act only "an innocent person who was wrongly convicted" could recover any restitution or fines where the "conviction has been overturned for reasons other than insufficiency of evidence or legal error unrelated to actual innocence." 137 S. Ct. at 1254. This Court held that the Act violated due process since once a conviction is erased *for any reason*, "the presumption of their innocence was restored." *Id.* at 1255. *Watt's* holding that an acquittal is irrelevant for purposes of sentencing because it is not an exoneration clashes with *Nelson*'s holding that an acquittal restores the presumption of innocence, a fact which *Nelson* held precludes any penalty from being sustained against the defendant.

Indeed, independent of *Nelson,* jurists and commentators have repeatedly questioned the continued validity of *Watts* in light of this Court's more recent Sixth Amendment jurisprudence. *See, e.g., Jones v. United States,* 135 S. Ct. 8 (2014) (Scalia, J., dissenting from denial of cert. (this Court should find "that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge."); *United States v. Bell,* 808 F.3d 926, 929 (D.C. Cir. 2015) (per curiam) (Millett, J., concurring in denial of reh'g en banc) ("[T]he time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation."); *United States v. White,* 551 F.3d 381, 391 (6th Cir. 2008) (Merritt, Martin, Daughtrey, Moore, Cole, and Clay, JJ., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v. Canania,* 532 F.3d 764, 776-77 (8th Cir. 2008) (Bright, J., concurring) ("[a] judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury" and the Due Process Clause of the Fifth Amendment since consideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding."); *United States v. Faust,* 456 F.3d 1342 (11th Cir. 2006) (Barkett, J., concurring) ("I join the majority in affirming Faust's conviction, but concur in its sentencing decision only because I am bound by Circuit precedent . . . sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment"); *see also* James J. Bilsborrow, Sentencing Acquitted Conduct to the Post-Booker Dustbin, 49 Wm. & Mary L. Rev. 289, 322 (2007) ("Compared to the sentencing practices struck down in Apprendi, Blakely, and Booker, the consideration of acquitted conduct appears even more egregious. In those three cases, the . . . constitutional problem simply centered upon the fact that with respect to the issues in question, the jury had not rendered any decision at all. In contrast, when a judge bases a sentence upon acquitted conduct, the facts have been considered by the jury and rejected. In a perverse reversal of procedural roles, the judge effectively nullifies the jury.").

Because *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument" (*United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) (merits opinion)) it is somewhat understandable that it is in tension with so many of this Court's other rulings. It should be reevaluated now.

## CONCLUSION

For the foregoing reasons, Mr. Delva respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,


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