12-4612

To Be Argued By:
S. DAVE VATTI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4612

UNITED STATES OF AMERICA,
Appellee,

-vs-

ARMANDO CARDONA,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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

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Statement of Jurisdiction

This an appeal from a judgment entered on November 16, 2012, after a jury found the defendant, Armando Cardona, guilty of one count of conspiracy to possess with the intent to distribute five kilograms or more of cocaine and one count of possession with intent to distribute five kilograms. Defendant's Appendix ("DA") 28, 33-34. The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On November 12, 2012, Cardona filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), DA30, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review[1]

I. Whether the district court erred in denying Cardona's motion to suppress evidence seized from his person, his car and his wife's residence based on its findings that (1) Cardona's arrest was supported by probable cause, (2) the search of his person was incident to his arrest, (3) there was probable cause to believe that his car contained evidence of a crime so that it was lawfully searched pursuant to the automobile exception, (4) the officers were justified in conducting a protective sweep of the residence and (5) the officers obtained a knowing and voluntary consent to search the residence.

II. Whether Cardona's claim that his trial counsel rendered ineffective assistance in failing to request a jury instruction indicating that he could not conspire with a government agent and in failing to object to the jury instruction regarding drug quantity should be heard on direct appeal, and, if so, whether counsel's performance was constitutionally deficient, given that the instructions at issue were proper.

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[1] The two issues set forth by the Government encompass all five of Cardona's claims, four of which attack the district court's denial of one of his motions to suppress and one of which alleges ineffective assistance of counsel.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-2688

UNITED STATES OF AMERICA,
Appellee,

-vs-

ARMANDO CARDONA,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On December 10, 2009, Arkansas State Police conducted a traffic stop of a truck being driven by Javier Morales-Gomez and discovered thirty kilograms of cocaine in a hidden compartment in the truck. Morales-Gomez cooperated and indicated that he had been hired by Cardona to deliver the cocaine to Cardona in Meriden, Connecticut. Utilizing Morales-Gomez, DEA personnel conducted a controlled delivery of the cocaine at a hotel in Meriden. After co-defendant Andres Alvarez, who had been sent to the hotel

by Cardona, met with Morales-Gomez and took possession of the cocaine and was arrested, Cardona also was arrested outside his wife's residence in Meriden. Following a protective sweep, agents conducted a consent search of the residence and seized approximately $370,000. Following Cardona's arrest, agents seized three cell phones from his car and $1,936 in cash and his driver's license from his person.

In this appeal, Cardona challenges the district court's denial of his motion to suppress evidence that was seized from his person, his car and his wife's residence. The court concluded that, based on the totality of circumstances, law enforcement personnel had probable cause to arrest Cardona and were justified in searching his person incident to that arrest. The court also opined that agents had a probable cause to believe that Cardona's vehicle contained evidence of a crime and that the search of his car was proper pursuant to the automobile exception to the warrant requirement. Finally, the court found that Cardona's wife voluntarily consented to the search of her residence and that her consent was preceded by a lawful protective sweep which did not taint the voluntariness of her subsequent consent. Accordingly, the court appropriately denied Cardona's motion to suppress.

Cardona also claims that he received ineffective assistance of counsel in that his trial counsel failed to ask the district court to instruct the

jury that the government's cooperating witness, Morales-Gomez, could not be regarded as a co-conspirator after he became a cooperating witness. Cardona further argues that trial counsel rendered ineffective assistance in failing to object to the drug quantity instruction because it permitted the jury to hold him liable for quantities involved in the conspiracy prior to the time he allegedly joined.

For the reasons that follow, these claims have no merit, and the judgment of the district court should be affirmed.

Statement of the Case

On December 12, 2009, Cardona was the subject of a warrantless arrest. DA6. On December 21, 2009, a federal grand jury returned an indictment charging Cardona with one count of conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and one count of possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). DA33-34.

On July 21, 2010, Cardona filed a motion to suppress evidence seized from his person, his automobile and his wife's residence. DA9. He argued that he was unlawfully searched as his arrest was not supported by probable cause, that there was no basis to conduct a search of his ve-

hicle, that his wife did not voluntarily consent to a search of her residence and that any consent was tainted by a preceding, unlawful protective sweep of her residence. Special Appendix ("SA") 20, 24-25, 28. On May 24, 2011, following a four-day evidentiary hearing, United States Magistrate Judge Donna F. Martinez issued a recommended ruling denying the motion, which was adopted by the district court on August 1, 2011. SA5-32, 33A.

On April 3, 2012, Cardona, who had obtained new counsel following the denial of the initial motion to suppress, filed a second motion to suppress evidence seized from his wife's residence, arguing that agents were required to exit the residence after completion of the protective sweep, that any entry thereafter to obtain her consent was an unlawful second entry, that the agents were required to obtain his consent to search the residence, in addition to his wife's consent, and that her consent did not extend to a black bag in the garage that contained $330,000 in cash and belonged to him. DA22, SA39, 42-43. On June 6, 2012, Magistrate Judge Martinez conducted another evidentiary hearing on these claims, and on June 14, 2012, the court issued a recommended ruling denying the second motion to suppress, which was adopted by the district court on June 18, 2012. SA33-45.

On June 20, 2012, following a three-day trial, a jury convicted Cardona of both counts charged in the indictment. DA28.

On November 8, 2012, the district court (Aldred V. Covello, J.) sentenced Cardona to 240 months' imprisonment and ten years' supervised release. DA30. Judgment entered on November 16, 2012. DA30. On November 12, 2012, Cardona filed a timely notice of appeal. DA30. Cardona is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to the Appeal

A. The evidence at the suppression hearings[2]

On December 10, 2009, following the traffic stop of a tractor-trailer, an Arkansas State Police officer discovered 30 kilograms of cocaine in

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[22] There were two evidentiary hearings held in connection with Cardona's motions to suppress evidence. The first was held over four separate days between March 23, 2011 and March 30, 2011, and involved testimony from DEA Task Force Officer Seth Corbin, DEA Special Agents Anastas Ndrenika and Jon Rubinstein, Meriden Police Detective John Cerejo, Gladys Cardona and Armando Cardona. At the second hearing held June 6, 2012, Rubinstein and Meriden Police Detective Robert Milslagle testified. In this section, the Government has summarized the evidence from both hearings.

a hidden compartment inside the tractor-trailer. GA75. The driver and owner of the truck, Javier Morales-Gomez, cooperated with law enforcement and stated that he had been hired several weeks earlier by a man named Armando Carmona or Cardona, who offered him $30,000 to deliver the cocaine from Arizona to Meriden, Connecticut. GA76, 124. Morales-Gomez indicated that this man was an older Cuban, had whitish-gray hair, had served a long prison term for murder, and that, during a prior delivery of 30 kilograms of cocaine in November 2009 to Cardona at the Meriden Inn in Meriden, Connecticut, Cardona had driven a dark colored Honda Pilot. GA77, 86, 88. Morales-Gomez also provided Cardona's phone number. SA6.

DEA agents in Arkansas, who had assumed control of the investigation, decided to conduct a controlled delivery to Cardona of the 30 kilograms of cocaine seized in Arkansas. GA15-17, 76. On the morning of Friday, December 11, 2009, DEA Special Agent Carlos Penagos notified DEA agents in Connecticut of the intended controlled delivery and requested assistance. GA75-76. That morning, Morales-Gomez and several DEA agents and task force officers from Arkansas began the drive from Arkansas to Connecticut with Morales-Gomez's tractor-trailer. GA18-19. On the way to Connecticut, Morales-Gomez made two phone calls to Cardona to confirm the delivery. GA96-97. Morales-

Gomez made no reference in the calls to the Meriden Inn, but he and Cardona agreed to speak when Morales-Gomez arrived at "the house." GA242, 653.

Meanwhile, DEA agents in Connecticut conducted an investigation in which Morales-Gomez's information was corroborated in several respects. GA77-84. Agents learned that an Armando Cardona, who was born in 1941, lived in Meriden. GA77, 81-82. Agents confirmed he was Cuban and that he had a murder conviction from 1973 for which he had served a substantial prison term. GA77, 83. On December 11, 2009, surveillance team members observed Cardona driving a black Honda Pilot. GA87-89. This car was not registered in Cardona's name, but it was registered to an address that was the same address that a Connecticut Department of Motor Vehicles database listed for Cardona. GA78, 91. Agents obtained a photograph of Cardona and sent it to the DEA agents who were on the road with Morales-Gomez. GA84-85. Morales-Gomez confirmed that the individual in the photograph was the person to whom he had intended to deliver the cocaine. GA85.

On Saturday, December 12, at approximately 4:00p.m., the agents in Connecticut held a briefing and advised the assisting officers about Cardona's criminal history, including his prior murder conviction. GA91-93, 257. They were told to consider Cardona dangerous. Some of the local

Meriden officers were assigned to set up surveillance at Cardona's wife's residence at 435 Bradley Avenue, Unit 30 in Meriden. GA94-95, 257-258.

That evening, Morales-Gomez drove to the Meriden Inn with two agents hidden in the truck. GA100. Morales-Gomez, who had been equipped with a body wire and transmitter, checked into Room 34, told agents he would call "the old man" (whom they understood to be Cardona) and, at approximately 8:00p.m., called Cardona and informed him he was at "the house" and was in "[Room] 34." GA99-100, 105, 193-194, 659. Subsequently, Morales-Gomez reported that Cardona was on his way. GA106. At that time, surveillance units at 435 Bradley Avenue observed Cardona leave that location in his Honda Pilot. GA106. A short time later, officers reported that Cardona had returned to 435 Bradley Avenue and then departed again a few minutes later in the same Honda Pilot. GA108.

At approximately 8:28p.m., Morales-Gomez received a call. Morales-Gomez asked the caller, "Did you come in?" and then said, "Who you going to send?" GA660. At approximately 8:31p.m., over the transmitter, agents heard a knock on the door of Morales-Gomez's room and then heard Morales-Gomez say, "How's it going?" GA661. His visitor, later determined to be co-defendant Andres Alvarez, responded that he was there to pick up "Papi's stuff." GA111.

Morales-Gomez and Alvarez went down to the parking lot and moved a duffel bag containing the cocaine from the tractor trailer to Alvarez's car. GA112-114. During this time, Alvarez began to look up towards the windows of the hotel and also around the parking lot in a suspicious manner. GA112. Alvarez was overheard telling Morales-Gomez that someone was watching from the hotel windows. GA112. After the cocaine was loaded into Alvarez's car, Alvarez attempted to drive out of the parking lot. GA115. He was boxed in by agents and arrested. GA115. At that point, agents confirmed that he was not Cardona and believed that he was a courier that had been sent by Cardona. GA115-116. Instructions were given to arrest Cardona on sight. GA118-119.

Within minutes of Alvarez's arrest, Meriden police officers on surveillance at Cardona's wife's residence at 435 Bradley Avenue saw him enter the parking area for Unit 30 at a very high speed. GA119, 264. As a result, officers were unable to box him in with their cars as they initially intended. GA264-265. The officers immediately moved in on foot with guns drawn while Cardona was still in his car, and yelled at him to show his hands and step out of the car. GA265-266. They were wearing police raid jackets and badges. GA265-266. Cardona did not comply and appeared to be reaching under the seat of his car. GA266, 292. Believing he might be reaching for a weapon and aware of his history,

officers forcibly removed him from the vehicle. SA12; GA134, 266-267.

During a brief struggle, Cardona was injured. GA267. His nose was bleeding, and he complained of chest pains. GA267, 293. Within a few minutes, a backup officer arrived. GA268-269. The Meriden officers immediately conducted a protective sweep of the residence while the backup officer remained with Cardona. GA269.

The purpose of the sweep was to determine if there was anyone in the residence who might threaten the security of the officers, destroy evidence or flee. GA269-271, 297, 308. Although the officers had been watching the apartment that evening, they had only been there since 7:00 p.m. and were not certain who might be inside. GA297, 304-305, SA12. Cardona had also been seen leaving twice from the residence in the run-up to the controlled delivery at the Meriden Inn and had come back to the same location at a high rate of speed shortly after Alvarez had been arrested. GA261-264, SA13. And the large amount of cocaine suggested to them a drug trafficking operation involving more than one person. GA 271.

The Meriden officers used the garage door opener in the Honda Pilot to open the garage and enter the house, yelling "Meriden Police!" GA271-272, 299. They found Cardona's wife, Gladys Cardona, alone inside. GA273-274, 300-301. After completing the sweep within a couple

minutes, one officer stayed with Mrs. Cardona, and the others went outside and summoned an ambulance for Cardona. GA268. An officer remained inside since Mrs. Cardona's possible connection to the transaction at the Meriden Inn was unknown, and there was concern that she might use a phone to alert other associates or destroy evidence. GA607-609.

Shortly after the protective sweep, DEA Special Agent Jon Rubinstein arrived at the scene. GA316. Cardona was on the ground outside the residence, handcuffed and leaning against his vehicle. GA316. Rubinstein went through the garage and entered the apartment, accompanied by one of the Arkansas officers. GA316-317. They found Mrs. Cardona sitting on the couch in her living room with the Meriden officer nearby. GA317-318. Rubinstein introduced himself to Mrs. Cardona, explained that her husband had been arrested and asked if he could speak with her about her husband. GA318-319. Mrs. Cardona was not under arrest, no handcuffs were placed on her and no guns were drawn at this time. GA35, 40, 274, 350.

Rubinstein addressed her in a normal tone of voice and was professional in his demeanor. GA36, 321. She was concerned, but calm. GA36, 61, 318. Rubinstein had no difficulty conversing with her in English. GA323. He did not threaten her in any way. GA38, 322. Mrs. Cardona informed him that she was separated from

her husband and that he no longer resided with her. GA319. She added that her husband occasionally stayed overnight in her apartment and that his things were still in the residence. GA319-320.

When asked whether she was aware of her husband's criminal history and of any illegal activity that he was involved in, she said that she knew he had been in prison for murder, but that she was unaware of any illegal activity he was involved in at this time. SA16-17. When asked whether there were any illegal drugs, weapons or other unlawful items in her house, she said that, if there were, they belonged to her husband. GA319-320. Rubinstein then asked her whether she would permit a search of her house. GA321. He asked for her consent, intending to continue to secure the premises while applying for a search warrant if she refused. GA630-636. She consented in writing, which was witnessed by Rubinstein and another officer. GA322-324.

Mrs. Cardona pointed out a bedroom Cardona used when he stayed at her apartment and also indicated that Cardona kept many of his belongings in the garage. GA323. Agents then searched the home. GA330-331. They found a duffel bag, containing approximately $330,000 in cash in the garage. GA343. The bag did not contain any tags, labels or marks indicating to whom it belonged. GA140-141, 368. Agents also found $13,000 in one bedroom and $27,626 in

another. GA142. In addition, they seized a cell phone and some documents. GA143.

Outside the residence, as Rubinstein was speaking to Mrs. Cardona, DEA Special Agent Anastas Ndrenika arrived and observed Cardona being placed on a stretcher and taken to a waiting ambulance. GA121-122. Ndrenika approached the Honda Pilot as he believed it could contain evidence, including cell phones, the $30,000 payment Morales-Gomez had been promised and a weapon, since the Meriden 13ransaers believed Cardona had been reaching under the seat for a weapon just prior to his arrest. GA123-124.

The driver's side door was open. GA122. Ndrenika, using a flashlight, observed three cell phones in plain view. GA122. He could see that one of the phones had a piece of paper with a phone number on it taped to the back of the phone. GA122. He immediately recognized the phone number as the one that Morales-Gomez had called Cardona en route to Connecticut. GA122. Ndrenika seized the phones. GA134. Although he searched under the driver's seat of the car, he did not locate a weapon. GA134-135.

After assisting with the search of the residence, Ndrenika went to the hospital where Cardona had been taken. GA138-144. He confirmed Cardona's identity and seized $1,936 in cash, a driver's license, some credit cards and

other documents from Cardona's person. GA144-145.

B. The rulings on the motions to suppress evidence

In its ruling on Cardona's initial motion to suppress, the district court first addressed the seizure of evidence from Cardona's person and ruled that, based on the totality of the circumstances, the officers had sufficient probable cause to believe that Cardona had committed a crime, despite Cardona's claim that he had not been seen at the Meriden Inn, and another party had received the cocaine. SA22-23. In reaching this conclusion, the court noted that officers had corroborated much of the information provided by Morales-Gomez, including his description of the man who had given him the cocaine for delivery, the individual's criminal record, where he lived and the vehicle he drove. SA23. In further support of its ruling, the court emphasized that agents had heard and recorded two calls between Cardona and Morales-Gomez while Morales-Gomez was en route to Connecticut and that officers had seen Alvarez arrive at the hotel and heard him indicate that he was there "to pick up Papi's stuff."[3] SA23. Accordingly, the

[3] Cardona testified at the initial suppression hearing and denied that he sent Alvarez, his cousin, to the Meriden Inn. GA554-555. While Cardona acknowledged that he knew Morales-Gomez and had recently

court held that Ndrenika's seizure of evidence from Cardona's person was a lawful search incident to a probable cause arrest. SA23.

Second, the court held that agents had probable cause to believe that the vehicle contained evidence of a crime. SA24. In reaching this conclusion, the court observed that Morales-Gomez had just delivered a large quantity of cocaine to Cardona's courier, that Cardona had been driving the Honda Pilot just prior to the delivery of the cocaine and that Morales-Gomez had several phone conversations with Cardona, whose phone number was known to the agents. The court also noted that a cell phone bearing the number that Morales-Gomez dialed to contact Cardona was visible on the seat of the car. On these facts, the court held that the automobile exception to the warrant requirement justified a search of Cardona's car. SA23-24.

The court next addressed the legality of the protective sweep that was conducted of Gladys Cardona's residence. SA25-26. The court observed that officers conducted the sweep because they believed somebody might be inside. The court set forth several facts that supported this

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met with him in Arizona, he claimed that it was coincidental that Alvarez and Morales-Gomez were meeting at the Meriden Inn. GA556. The court found that Cardona's testimony was not credible. SA18-19.

belief, including that surveillance had seen a woman leaving and returning to the house with Cardona, that on the evening in question officers had been watching the house for only a few hours and were uncertain who else had entered or left the house, that Cardona had been seen coming and going from the home during the time the drugs were to be delivered, that he had driven home at high speed after Alvarez was arrested and that the large amount of cocaine involved suggested that other people were involved in the operation. SA27-28. The court underscored that Cardona's arrest had occurred under the windows of the residence and that the officers remained visible and exposed to anyone inside. SA27-28. Finally, the court took note that the sweep was quick and limited to a check for persons who might pose a danger or destroy evidence. On these facts, the court concluded that the officers conducted a legal protective sweep that did not taint subsequent interactions with Mrs. Cardona. SA27-28.

Lastly, the court addressed Cardona's claim that Mrs. Cardona's consent to search her residence was not voluntary. The court observed that Mrs. Cardona speaks English fluently and is "a mature, intelligent and resourceful woman." SA30. The court credited the testimony of agents who had described Mrs. Cardona as calm and cooperative and who had stated that the conversation with Mrs. Cardona was profession-

al and short, that she signed the consent voluntarily and offered information as to where in the residence Cardona's possessions were located. SA30. The court also emphasized that, except for her assertion that officers had told her they would not be "nice" if they had to get a search warrant, Mrs. Cardona did not describe intimidating or coercive conduct by the officers.[4] SA30-31. Accordingly, the court found that her consent was voluntary and denied the motion to suppress evidence seized from her residence. SA30-31.

In its June 14, 2012 ruling on Cardona's second motion to suppress, the court held that Mrs. Cardona's presence in the apartment during the protective sweep justified law enforcement officers remaining with her after the sweep was completed to secure the premises and rejected Cardona's argument that Rubinstein's entry into the apartment following the completion of the sweep constituted an unlawful second entry. SA39-41. Further, the court opined that officers were not required to obtain Cardona's consent because he was not physically present in the apartment when his wife gave her consent to

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[4] Finding that Mrs. Cardona's testimony at the hearing contradicted statements she had made in an affidavit that had been filed earlier, the court determined that she was not credible in her testimony about events that preceded her signing the consent form. SA17-18.

search, and there was no evidence that he had been removed solely to avoid a potential objection to consent. SA42-43. Last, the court held that Mrs. Cardona's consent extended to all areas of the apartment, including to a black bag containing a large sum of money that was found in the garage.[5] SA44-45.

Summary of Argument

I. The district court's denial of Cardona's motion to suppress evidence seized from his person, his car and his wife's residence should be affirmed for the following reasons. First, based on the totality of circumstances known to the arresting officers, there was probable cause to believe that Cardona had violated federal narcotics laws by conspiring to have a multi-kilogram shipment of cocaine delivered from Arizona to Connecticut. While much of the circumstances known to the officers was based on information supplied by a cooperating witness, that information had been corroborated in material respects and the cooperator's reliability was sufficiently established for a probable cause determination and a warrantless arrest. As such, any

[5] Cardona has not raised the claims contained in his second motion to suppress in this appeal. Instead, he has raised only those claims that were presented in his initial suppression motion. Accordingly, the Government has confined its discussion to those claims.

evidence seized from Cardona's person was the product of a lawful search incident to arrest.

Second, based on the totality of circumstances, including information provided by the cooperator and the events of the controlled delivery at the Meriden Inn, agents had probable cause to believe that Cardona's car contained fruits, instrumentalities and evidence of narcotics violations. Therefore, pursuant to the automobile exception to the warrant requirement, an immediate search of Cardona's car was permissible.

Third, the search of Cardona's wife's apartment was conducted pursuant to a voluntary and written consent given by Mrs. Cardona. She was not been placed under arrest, was not handcuffed and was addressed in a calm, professional manner. She conversed fluently with the agents in English. Not only did she have the authority to consent, but she gave that consent free of any coercion.

Fourth, the consent search was preceded by a lawful protective sweep of the premises to protect against the potential destruction of evidence and to assure the safety of officers who had taken Cardona into custody in front of the residence. Given the sheer scope of the drug transaction in which Cardona was engaged, it was reasonable for officers to assume that he may have confederates in the residence who posed a threat to their safety or to the integrity of evidence in the residence. Thus, the sweep was

within the scope permitted by the Fourth Amendment and did not unlawfully taint the consent obtained from Mrs. Cardona.

II. Cardona's claims of ineffective assistance of counsel should not be heard on direct appeal because there is no factual record containing trial counsel's explanations for the actions he took. And if this Court were to consider the claim, Cardona cannot sustain his burden of demonstrating ineffective assistance. Where there was substantial evidence that Cardona reached a conspiratorial agreement to violate the narcotics laws with the cooperating witness prior to when that individual became an informant, an instruction that a government agent cannot be a co-conspirator was unwarranted and should not have been given, especially since there was evidence that another co-defendant, Alvarez, participated in the conspiracy with Cardona. Similarly, trial counsel was not ineffective for failing to object to the quantity instruction on grounds that it permitted Cardona to be held responsible for quantities transacted prior to when he joined the conspiracy. No such evidence was offered by the Government, and thus, to the extent that the quantity instruction permitted Cardona to be held responsible for quantities transacted prior to the date of his arrest, the instruction had no material bearing on the outcome of the trial.

Argument

I. The seizure of evidence from Cardona's person, his car and his wife's residence complied with Fourth Amendment requirements and Cardona's motion to suppress was properly denied.

In this appeal, Cardona reiterates the same arguments he made in the district court in his initial motion to suppress. First, he claims that his warrantless arrest was without probable cause because there was no corroboration of any criminal activity between himself and Morales-Gomez, and no one saw him engage in any illegal activity. Def.'s Br. At 22-23. Second, he claims that the search of his car was improper because there was no probable cause to believe that his car contained evidence of a crime, and a flashlight was impermissibly used to illuminate the interior of the vehicle. Def.'s Br. At 24-25. Third, he argues that there was no reasonable basis to conduct a protective sweep of his wife's residence and that her consent was derived from an illegal sweep. Def.'s Br at 27. Finally, he claims that his wife's consent was not voluntary, but was merely an acquiescence to a show of authority. Def.'s Br. At 30-31. For the reasons set forth below, these claims are without merit.

A. Relevant facts

The relevant facts are set forth above in the "Statement of Facts and Proceedings Relevant to this Appeal."

B. Standard of review and governing law

In reviewing the denial of a suppression motion, the Court of Appeals reviews the district court's conclusions of law *de novo,* and its findings of fact for clear error, taking those facts in the light most favorable to the government. *See United States v. Watson*, 404 F.3d 163, 166 (2d Cir. 2005); *United States v. Arvizu*, 534 U.S. 266, 275 (2002).

1. Probable cause to arrest

A warrantless arrest is reasonable under the Fourth Amendment if the arresting officer has probable cause to believe that a crime has been or is being committed. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Probable cause is a "practical, non-technical conception . . . a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983); *United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2d Cir. 1988). "Only the probability, and not a *prima facie* showing of criminal activity is the standard of probable cause." *Id.*, 462 U.S. at 235; *United States v. Harwood*, 998 F.2d 91 (2d Cir. 1993).

Probable cause exists where the facts and circumstances within an officer's knowledge and of which he has a reasonable trustworthy belief are sufficient in themselves to warrant a man of reasonable caution in the belief that a crime has been or is being committed or that evidence of a crime will be found in the place to be searched. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949); *Carroll v. United States*, 267 U.S. 132, 162 (1925); *Curley v. Suffern*, 268 F.2d 65, 70 (2d Cir. 2001). Its focus is on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Brinegar*, 338 U.S. at 175.

In *United States v. Benevento*, 836 F.2d 60, 66-67 (2d Cir. 1987), this Court noted:

> Probable cause 'requires only a probability or substantial chance of criminal activity, [and] not an actual showing of such activity.' . . .Determinations of whether probable cause is present must be drawn from an evaluation of 'the totality of the circumstances; . . . , and the appropriate standard must be applied in a 'flexible common' sense manner.

Id (citations omitted). Further, "experience and training may allow a law enforcement officer to discern probable cause from facts and circumstances where a layman might not." *United States v. Gaskin*, 364 F.3d 438 (2d Cir. 2004) (internal citation omitted); *see also United States v.*

Price, 599 F.2d 494, 501 (2d Cir. 1979) (holding that circumstances must be viewed "through the eyes of a reasonable and cautious police officer on the scene guided by his experience and training"). Finally, warrantless arrests may be made in public places as long as there is probable cause to support the arrest. *United States v. Watson*, 423 U.S. 411, 423-424 (1976). Exigent circumstances are not required. *Id.*

In *Gates*, 462 U.S. 213, the Supreme Court, in assessing whether statements by an informant could establish probable cause, "reaffirm[ed] the totality of the circumstances analysis that 24ranstionally has informed probable cause determinations." *Id.* At 238. In considering the "totality of the circumstances" in the context of an informant's statements, courts may consider "an informant's veracity, reliability and basis of knowledge," *id.* at 230, and the extent to which an informant's statements-even about a suspect's innocent activities-are independently corroborated. *Id.* at 241-244 (holding that the corroboration of facts in an informant's letter that the defendant's car would be in Florida, that one of the defendant's would fly to Florida in the next day or so and that the defendant would then drive towards Bloomington, Indiana, all contributed to a legitimate belief that the informant's additional assertions of criminal activity were true).

2. Search incident to valid arrest

It is well established that a person validly arrested may be searched without a warrant. There does not need to be any particularized indication that the person arrested possessed weapons or evidence. Although there must be probable cause for the arrest, probable cause for the search of the person is not required. The lawful arrest, standing alone, authorizes a search. *See Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

3. The automobile exception to the warrant requirement

The automobile exception to the warrant requirement was first pronounced in *Carroll*, 267 U.S. 132. In *Carroll*, law enforcement officers had probable cause to believe that a car they had observed contained illegal liquor. They conducted a traffic stop, searched the car and found illegal liquor in the upholstery. They seized the liquor and arrested the occupants. In upholding the search, the Supreme Court, noting that it was not practicable to secure a warrant where a vehicle can be quickly moved out of the jurisdiction where the warrant must be sought, held:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause,

> that is upon a reasonable belief arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id.

Subsequently, in *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court extended the automobile exception to a vehicle search where the occupants and car were already in police custody, and there was no particular exigency requiring an immediate search. In so doing, the Court noted:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. at 52.

Subsequent Supreme Court precedent reaffirmed the principle that, where there is probable cause to believe that a vehicle contained contraband or evidence of a crime, an immediate search without a warrant was permissible, irrespective of any particular exigency. For exam-

ple, in *Michigan v. Thomas*, 458 U.S. 259, 261 (1982), the Supreme Court held that "the justification to conduct a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." *Id.*

Most recently, the Supreme Court reversed two state cases which had held that the Fourth Amendment warrant requires police to obtain a warrant before searching an automobile unless exigent circumstances are present, noting that those "holdings rest on an incorrect reading of the automobile exception to Fourth Amendment's warrant requirement." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *see also Maryland v. Dyson*, 527 U.S. 465 (1999) (finding that a lower court had incorrectly held that the automobile exception requires a separate finding of exigency in addition to a finding of probable cause); *United States v. Howard*, 489 F.3d 484 (2d Cir. 2007) (holding that once there is probable cause to believe that a vehicle contains contraband, it may be searched immediately without regard to whether it is practicable to obtain a warrant, and noting that "whether a vehicle is "readily mobile" within the meaning of the automobile exception has more to do with the in-

herent mobility of the vehicle than with the potential for the vehicle to be moved from the jurisdiction, thereby precluding a search).

4. The protective sweep

Police officers may conduct a limited protective sweep of a residence–without a warrant–when making an arrest on private premises if they possess "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 327 (1990) (security sweep following an in-home arrest proper under the circumstances); *see also Payton v. New York*, 445 U.S. 573, 589 (1980). In effect, the Supreme Court has applied a standard of reasonable suspicion to the need for a security sweep.

Following *Buie*, this Court held, in the context of a protective sweep of a home outside of which an arrest had been made, that such an entry was permissible "if the arresting officers had (1) a reasonable belief that third persons [were] inside, and (2) a reasonable belief that the third persons [were] aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public." *United States v. Oguns*, 921 F.2d 442, 446 (2d Cir. 1990) (internal quotations omitted).

As this Court has recognized:

> [T]he reasonableness of a security check is simple and straightforward. From the standpoint of the individual, the intrusion on his privacy is slight; the search is cursory in nature and is intended to uncover only 'persons, not things.' Once the security check has been completed and the premises secured, no further search be it extended or limited is permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important, the safety of the arresting officers or members of the public may be jeopardized.

United States v. Agapito, 620 F.2d 324, 336 (2d Cir. 1980).

5. Consent search

A search based on the consent of an individual may be undertaken by law enforcement without a warrant or probable cause, and any evidence discovered during the search may be seized and admitted at trial. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). A warrantless search does not violate the Fourth Amendment if "the authorities have obtained the voluntary consent of a person authorized to grant such consent." *United States v. Elliot*, 50

F.3d 180, 185 (2d Cir. 1995). Indeed, the Supreme Court has recently commented on the salutary effect of law enforcement officers seeking such consent rather than resorting in the first instance to compulsory court process:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

United States v. Drayton, 536 U.S. 194, 207 (2002).

"So long as the police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search." *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995). Therefore, a consent to search need only be voluntary, not fully knowing and intelligent. *See Schneckloth*, 412 U.S. at 235-36; *Garcia*, 56 F.3d at 422. Indeed, consent may be valid even though a person did not understand the possible consequences of an officer's request and was not informed of the right to refuse consent. *See, e.g., Schneckloth*, 412 U.S. at 248-49; *Drayton*, 536 U.S. at 206 (the Supreme Court "has rejected in specific terms the suggestion that police officers must always

inform citizens of their right to refuse when seeking permission to conduct a warrantless search.").

For the consent to be valid, it must be voluntary, that is, it must be the product of free choice. *See United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993). The government bears the burden of proving by a preponderance of the evidence that consent was voluntary. *See United States v. Matlock*, 415 U.S. 164, 177-78 n.14 (1974). Whether an individual has voluntarily consented to a search is a fact-based inquiry that must be determined by the "totality of all the circumstances." *Schneckloth*, 412 U.S. at 227; *Wilson*, 11 F.3d at 351. Factors that courts consider in assessing the voluntariness of consent include the individual's age, intelligence and educational background, the length and nature of the questions and whether the law enforcement officials engaged in coercive behavior. *Schneckloth*, 412 U.S. at 226-27. In addition, courts consider the degree to which the individual cooperates with the police and the individual's attitude about the likelihood of the discovery of contraband. *See, e.g., United States v. Rosi*, 27 F.3d 409, 413 (9th Cir. 1994).

This fact inquiry is governed by an objective standard. The ultimate question is whether "the officer had a reasonable basis for believing that there had been consent to the search." *Garcia*, 56 F.3d at 423. "The standard for measuring the

scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). "'The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to conduct the search that was undertaken.'" *Garcia*, 56 F.3d at 422 (quoting *Jimeno*, 500 U.S. at 249).

Voluntary consent need not be documented or declared expressly in words; voluntary consent may be implied by the circumstances surrounding the search or by the consenting person's words or actions. *See United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993) (voluntary consent "need not be expressed in any particular form but 'can be found from an individual's words, acts, or conduct'") (quoting *Krause v. Penny*, 837 F.2d 595, 597 (2d Cir. 1988)). "Thus a search may be lawful even if the person giving consent does not recite the talismanic phrase: 'You have my permission to search.'" *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981). Moreover, if the law enforcement officer objectively reasonably believes that he or she has consent to search, then there is no Fourth Amendment violation. *Garcia*, 56 F.3d at 423.

C. Discussion

1. Under the totality of circumstances, there was probable cause for a warrantless arrest of Cardona and any evidence seized from his person was the subject of a lawful search incident to arrest.

Cardona claims on appeal that there was no probable cause to support his arrest because the agents were unable to corroborate any criminal activity between Morales-Gomez and Cardona, Cardona was not observed first-hand engaging in criminal activity, Morales-Gomez was not credible and any corroboration of his claims was as to pedigree information only. Thus, Cardona argues that all evidence seized following his arrest should be suppressed. His argument has no merit.

Here, the totality of circumstances supported probable cause to arrest Cardona. Morales-Gomez had indicated that Cardona, whom he knew as Armando Carmona or Cardona, was expecting the delivery of the 30 kilograms of cocaine in Connecticut and intended to pay Morales-Gomez $30,000 for the delivery. GA76, 124. Morales-Gomez provided a number of details regarding Cardona, including that he was Cuban, had whitish-gray hair, was an older man and had previously served a prison sentence for murder. GA77, 86. He had indicated that a previous 30 kilogram transaction between himself

and Cardona had occurred at the Meriden Inn and that Cardona had been driving a dark-colored Honda Pilot at the time of that transaction. GA88. En route to Connecticut, he made two phone calls to Cardona. GA96-97.

DEA agents in Connecticut corroborated much of the information provided by Morales-Gomez. They determined that an Armando Cardona lived in Meriden, he was an older male, he was Cuban, he had been previously convicted of murder and he had served a lengthy prison term as a result of that conviction. GA77-84. Further, as a result of surveillance conducted on December 11, 2011, they confirmed that Cardona drove a Honda Pilot and that the Pilot was registered to an address that was associated with Cardona. GA78, 87-89, 91. *See United States v. Wagner*, 989 F.2d 69, 73 (2d Cir. 1993)("Even where an informant has no proven record, if an informant's declaration is corroborated in material respects, the entire account may be credited, including parts without corroboration"); *United States v. Canfield*, 212 F.3d 713, 719 (2d Cir. 2000)(corroboration of "innocent details" provided by an informant means that "there is a higher probability the incriminating facts are true"). After obtaining a photograph of Cardona, they sent it to the agents accompanying Morales-Gomez, and Morales-Gomez confirmed that Cardona was the individual who hired him to transport the load of cocaine. GA84-85.

On December 12, after calling Cardona and confirming that he would be arriving in a few hours, Cardona told Morales-Gomez to call when he arrived at "the house." GA100, 105. Morales-Gomez understood this to mean the Meriden Inn which had been the location of their prior transaction. GA100, 105. After Morales-Gomez checked into the Meriden Inn, he called Cardona and informed him that he was at the house and gave him the room number. GA100, 105. Morales-Gomez made no specific mention of the Meriden Inn. Cardona indicated he would be there shortly. GA106. At this time, surveillance team members observed Cardona leave his wife's residence in his black Honda Pilot. GA108. He returned about fifteen minutes later, went inside for a brief time, and then left the area again. GA108.

During another phone call, Cardona appeared to indicate he would be sending someone else. GA660. Subsequently, Alvarez knocked on the door of Morales-Gomez's room and announced that he was there for "Papi's stuff." GA111. After Alvarez attempted to drive away with the cocaine, he was arrested. GA115. Within a few minutes of Alvarez's arrest, Cardona drove into the parking lot of his wife's residence at a high rate of speed. GA119. Based on their training and experience, agents believed that Cardona had been in the vicinity of the Meriden Inn and had seen his courier apprehended.

At that point, based on the information provided by Morales-Gomez, which had been confirmed in many respects by the investigation into Cardona's background and the corroborating events of the controlled delivery, including the pick-up of the cocaine at the Meriden Inn, the agents had a justifiable basis to believe the information supplied by Morales-Gomez was accurate and reliable. Indeed, the agents had probable cause to believe that the person identified by Morales-Gomez, namely Cardona, was the person who instigated the delivery of the cocaine to Connecticut. Accordingly, the warrantless arrest of Cardona was supported by probable cause, and the subsequent search of his person was valid as a search incident to arrest.

2. A search of Cardona's car was proper pursuant to the automobile exception to the warrant requirement.

Cardona challenges the search of his car on the ground that case agents lacked probable cause to believe that the car contained evidence of a crime and that they used a flashlight to ascertain that there were phones inside the car. On the contrary, case agents had probable cause to search the car for evidence related to a crime immediately following Cardona's arrest.

As a preliminary matter, the Government acknowledges that Cardona was in handcuffs and in police custody at the time of the warrant-

less search of his Honda Pilot. But, whether there was a practical likelihood that Cardona, or anyone else for that matter, could have driven the car away under the factual circumstances which existed is completely irrelevant. The Government has no burden to demonstrate any exigencies that made it impractical to obtain a warrant. Once there existed probable cause to believe that Cardona's vehicle may contain evidence of a crime, it was entirely appropriate under the automobile exception to conduct an immediate search, irrespective of whether a warrant could be obtained. *Howard*, 489 F.3d at 494-496.

Immediately following Cardona's arrest, there was probable cause to believe that the vehicle being driven by him might contain fruits, instrumentalities and evidence relating to narcotics violations. Agents already had information from Morales-Gomez that the seized 30 kilograms of cocaine was intended for Cardona. GA76, 124. They were also aware that Cardona drove a black Honda Pilot and that, about one month earlier, Cardona had been driving that same car when he met with Morales-Gomez to take a different shipment of cocaine. GA77, 86, 88. The phone calls between Morales-Gomez and Cardona leading to Alvarez's arrival at the Meriden Inn and subsequent possession of the 30 kilograms of cocaine established that Cardo-

na had sent Alvarez to take delivery of the cocaine.

Further, it was well known to the agents that drug traffickers utilize cell phones as tools of the trade. GA74. Indeed, Cardona was using the same cellular telephone number during all of the phone calls on December 11 and 12 with Morales-Gomez in the run-up to the events at the Meriden Inn. GA96-97, GA122-124. Thus, that phone used by Cardona was a vital link between him and the events at the Meriden Inn, and it was reasonable for agents to believe that he would have this phone on his person or in his vehicle.

Moreover, through training and experience, case agents also knew that large scale drug traffickers like Cardona often use couriers to take possession of narcotics to insulate themselves from law enforcement activity. GA117. Here, case agents believed that Alvarez was a courier sent by Cardona and that it was likely that Cardona would stay in contact with his courier by cell phone. GA123-124. It was logical to presume that there would be cell phones in the Honda Pilot containing evidence of his activities, particularly since Cardona was observed leaving in this car shortly after telling Morales-Gomez he was on his way and was seen "flying into the complex" at 435 Bradley Avenue after agents suspected that Cardona had witnessed Alvarez's arrest. GA106, 119, 264.

Finally, case agents also knew that Cardona had agreed to pay $30,000 to Morales-Gomez. GA124. Given that they suspected he was in the vicinity of the Meriden Inn to observe what transpired, GA117, 124, it was reasonable to assume that he would have the money to pay Morales-Gomez with him if the delivery of the cocaine had been successful. In short, evaluating the totality of circumstances known to them at the time of Cardona's arrest in a practical, common-sense fashion, there was probable cause to believe that the Honda Pilot might contain fruits, evidence and/or instrumentalities relating to narcotics violations. The Honda Pilot's "inherent" mobility was readily apparent. Under *United States v. Ross*, 456 U.S. 798 (1982), and subsequent Supreme Court precedent as well as *Howard*, such an immediate search of a vehicle is a reasonable one consistent with the requirements of the Fourth Amendment.

In addition, contrary to Cardona's claim, the use of a flashlight to illuminate the interior of the vehicle prior to the seizure of cell phones was entirely proper. First, as the officers had probable cause to search the vehicle for evidence of a crime pursuant to the automobile exception, the use of flashlight to enable that search was permissible. Second, even if the automobile exception does not apply, the officer observed the cell phones in plain view through the open door of the car and even saw that one of the phones bore

the same number that belonged to Cardona and which had been in communication with Morales-Gomez prior to the controlled delivery. The officer's use of a flashlight does not undermine the applicability of the plain view exception. *See Texas v. Brown*, 460 U.S. 730, 739-740 (1983) (holding that use of a flashlight to aid vision did not transform an otherwise valid plain view observation into an illegal search and noting that use of artificial means of illumination does not constitute a search that triggers Fourth Amendment protections); *Mollika v. Volker*, 229 F.3d 366, 369 (2d Cir. 2000) (once a vehicle is lawfully stopped, a police officer's observation from outside the car, even when shining a flashlight into the car, is not a Fourth Amendment search); *United States v. Ocampo*, 650 F.2d 421, 427 (2d Cir. 1981)(during drug investigation, officer's observation and seizure of bag of currency on back seat of lawfully stopped car was justified under plain view exception even though officer used flashlight to aid his vision).

Accordingly, Cardona's motion to suppress items seized from his car was correctly denied by the district court.

3. The protective sweep of Cardona's wife's apartment was lawful and did not taint her written consent to search the premises.

Cardona claims that there were no specific and articulable facts justifying a protective sweep of his wife's residence. He further argues that the unlawful sweep tainted any consent given by his wife. These arguments have no merit.

There was a reasonable basis to believe that there might be individuals inside the premises that posed a threat to the safety of officers or to the integrity of evidence, thereby necessitating a security sweep. Based on the briefing that they had received from DEA agents, the Meriden police officers who arrested Cardona were aware that he had anticipated a delivery of 30 kilograms of cocaine. Cardona had also been seen leaving twice from his wife's residence in the run-up to the controlled delivery and came back to the same location at high speed shortly after Alvarez had been arrested. GA261-264. Thus, it was reasonable for the officers to assume that this was Cardona's base of operations for this transaction. Given the amount of cocaine involved, it was also logical to believe that Cardona might have other confederates at this location that were involved in the transaction. GA271. This conclusion was buttressed by the fact that the officers were aware from radio communica-

tions that Alvarez, and not Cardona, had been arrested at the Meriden Inn after taking possession of the 30 kilograms of cocaine.

Further, Cardona's arrest was readily apparent to anyone inside the residence. Unit 30 is in the very rear of the complex in a building that is set somewhat apart from others in the complex. GA266. After Cardona quickly pulled up in front of Unit 30, officers ran to the car and asked him to step out. GA265-266. After he refused and appeared to reach under the seat as if reaching for a weapon, he was forcibly removed, and a scuffle ensued during which Cardona suffered injuries. GA266-268. Given the commotion occurring in the front of the home, it was certainly reasonable for the officers to have thought their presence was likely to be known by any other persons present in the home who posed a potential threat to their safety or who were in a position to destroy evidence. As the district court noted, "Cardona's arrest had occurred under the windows of the house, and officers remained visible and exposed to anyone inside." SA28.

In as much as it is common knowledge that firearms are often tools of the drug trafficking trade, the Meriden officers' fear that there might be persons that could pose a threat to the safety of the officers at the scene was a justifiable one. While it may have ultimately turned out that there were no weapons in the home and that only Mrs. Cardona was present, the determinative

factor is not the ultimate outcome, but the reasonable perceptions of the officers prior to the conduct of the sweep.

Finally, the scope of the sweep was no broader than that necessary to protect the officers from the perceived danger. The officers looked only for persons that may have been present in the house. No further search for any contraband was conducted. No seizure of any evidence took place during the sweep. Given the factual circumstances known to the officers prior to the conduct of the sweep and its limited nature, the sweep here comported with the reasonableness requirement of the Fourth Amendment and did not taint any subsequent interactions with Mrs. Cardona during which her consent to search was obtained.

4. The search of Cardona's wife's apartment was conducted pursuant to a knowing and voluntary consent.

Cardona claims that his wife did not freely give consent and merely gave in to the officers' show of authority. There is no support for that claim in the record.

Following the completion of the protective sweep, Rubinstein entered the apartment, introduced himself and spoke to Mrs. Cardona in a professional and calm demeanor while explaining the presence of the law enforcement officers

and asking her if he could speak with her about her husband. GA318-319. Rubinstein and the other officers who were present did not have their guns drawn. GA35. They did not place Mrs. Cardona under arrest or in handcuffs. They did not yell at her. GA36, 321-323.

In conversation with Rubinstein, Mrs. Cardona explained that she was the renter of the premises and had lived there for approximately 21 years. She also explained that her husband no longer lived there but was living with his sister at another address in Meriden, though he still maintained some belongings at her residence. GA319. When asked whether there were any drugs, weapons or other illegal items in her apartment, she replied that if there were, they belonged to her husband. GA319-320.

Though Mrs. Cardona was concerned, she remained calm during this conversation, which proceeded in a deliberate fashion giving her the time to reflect on her course of action. She also seemed eager to distance herself from her husband. She did not appear to be under the influence of alcohol or controlled substances and had her faculties about her. She was able to converse easily in English with the case agents. GA323.

Rubinstein then asked Mrs. Cardona for permission to search her house. She agreed and signed a written consent form. GA323-324. Although Rubinstein did not inform her that she

could refuse consent, the Supreme Court made clear in *Schneckloth* that there is no requirement that officers advise that consent may be refused. Indeed, there is no basis to conclude that Mrs. Cardona's consent was anything but voluntary. She was not arrested, handcuffed or confronted with drawn weapons. She was not treated as a suspect in the cocaine conspiracy which the officers were investigating; the agents made clear that they were investigating her husband. She made efforts to distance herself from her husband's activities and her consent to a search, manifested in her own writing, was a logical extension of her efforts in this regard.

Most importantly, the district court had the opportunity to observe Mrs. Cardona during her testimony, which was critical to an appraisal of her ability to give voluntary consent. As the court noted, "Mrs. Cardona speaks English fluently and is a mature, intelligent and resourceful woman." SA30. While Cardona claims that the officers' presence was like a "home invasion," that Mrs. Cardona was "shocked," and that she was told that officers would not be "nice" if they had to obtain a warrant to support his claim of coercion, Def.'s Br. at 30, the district court credited the officers' testimony that there was no coercive conduct. The court noted internal contradictions in Mrs. Cardona's competing version of events and the fact that her testimony at the hearing that she steadfastly refused consent

multiple times contradicted her statement in a prior sworn affidavit submitted in February 2010 that she had never refused consent. SA17-18. It was properly the province of the district court to draw such a credibility determination after having the opportunity to personally observe all of the witnesses during their testimonies.

In sum, the district court's conclusion that Mrs. Cardona had the requisite authority to consent to a search and that her consent was voluntary is amply supported by the record and, accordingly, the motion to suppress evidence seized from her residence was properly denied.

II. Cardona's claims of ineffective assistance of counsel should not be heard on direct appeal and are nevertheless meritless as the jury instructions at issue were proper.

A. Relevant facts

Count One of the Indictment charged Cardona and Alvarez with conspiring together and with others known and unknown to possess with the intent to distribute five kilograms or more of cocaine from November 2009 through December 2009. DA33-34. Count Two charged that, on December 12, 2009, Cardona and Alvarez possessed with intent to distribute five kilograms or more of cocaine. DA34.

Based on the evidence admitted at trial, the jury could have reasonably found the following facts: in October 2009, Cardona called Morales-Gomez and asked to see him personally. DA554. They met at Morales-Gomez's house in Peoria, Arizona towards the end of October 2009. DA554. Records from the Hampton Inn in Peoria confirm that Cardona stayed there from October 30-31, 2009. DA507-508, 514-517. At this meeting, Cardona informed Morales-Gomez that he needed someone to move drugs for him. DA554. Cardona and Morales-Gomez then reached an agreement where Morales-Gomez would transport 30 kilograms of cocaine from Arizona to Connecticut for $30,000. DA555, 560. Cardona delivered the load to Morales-Gomez who placed the cocaine into a hidden compartment in his truck. DA555-557. After receiving a legitimate commercial load, Morales-Gomez then drove to Massachusetts to deliver the commercial load, stopping in Connecticut on the way to drop off the cocaine to Cardona at the Meriden Inn. DA558-559. Morales-Gomez received $30,000 from Cardona for this delivery. DA561.

In the beginning of December 2009, Cardona came to Arizona again to meet with Morales-Gomez. DA565. Records from the Hampton Inn in Peoria confirm that Cardona stayed there from December 4-7, 2009. DA507-508, 514-517. On this occasion, Cardona again offered Morales-Gomez $30,000 to transport a load of co-

caine to Connecticut. DA566. Cardona delivered the cocaine to Morales-Gomez who placed it into the hidden compartment in his truck. DA567. After receiving a commercial load, Morales-Gomez departed for Connecticut. DA568. After the traffic stop in Arkansas in which officers seized the 30 kilograms of cocaine from his truck, Morales-Gomez cooperated. DA572-573.

Eventually, after arriving in Connecticut, Moralez-Gomez checked into Room 34 at the Meriden Inn and, at approximately 8:00p.m., called Cardona and informed him that he was at "the house." DA581. At approximately 8:28 p.m., Cardona called Morales-Gomez and stated that he would be sending someone else. DA506, 581. Cardona then immediately called cellular telephone 347-445-2607, a phone seized from Alvarez at the time of his arrest. GA506-507, 665-666. Shortly after, there was a knock on the door of Room 34 and, when Morales-Gomez answered, Alvarez, whom he did not know, was at the door. DA582.

According to Morales-Gomez, Alvarez stated that he had come to "pick up the thing for the old man." DA582. Alvarez asked if the drugs were in the room and Morales-Gomez replied that he had it in the truck. DA582. Alvarez then accompanied Morales-Gomez to the back parking lot of the hotel. DA582. When Morales-Gomez went to open the truck, Alvarez pointed out that someone was watching them from a window in

the hotel. DA582. Morales-Gomez suggested that Alvarez move his car to the side of the hotel where there were no windows, which Alvarez did. DA 582-583.

Alvarez was nervous. Together, they put the bag of cocaine into Alvarez's car. Alvarez then drove away. DA583. Alvarez was stopped and arrested as he tried to leave the hotel parking lot with the cocaine. Officers seized Alvarez's phone at the time of his arrest and confirmed, through toll records, that he had made a call to Cardona shortly before his arrest.

In charging the jury on the conspiracy count, the district court, in pertinent part, gave the following instructions:

> Now, with respect to this charge there are two elements that the Government must prove, each beyond a reasonable doubt, before you can find the Defendant guilty of conspiracy with intent to distribute and to distribute cocaine.
>
> First that the conspiracy agreement or understanding to possess with intent to distribute and to distribute a controlled substance, namely cocaine, as described in the indictment, was formed, reached, or entered into by two or more persons. Second, that at the time during the existence or life of the conspiracy, agreement, understanding, the Defendant knew the

purpose of the agreement and then deliberately joined the conspiracy or understanding.

Let's talk about the first element, the existence of an agreement. A criminal conspiracy is an agreement or mutual understanding knowingly made and knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime. . . .

The Government must prove that the Defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they would violate the law by some common plan or course of action as alleged in Count 1 of the indictment. . . .

The second element, membership in the conspiracy. In order to find that the Defendant or any other persons became a member of the conspiracy charged in Count 1 of the indictment, the evidence in the case must show beyond a reasonable doubt that the defendant knew the purpose or goal of the agreement, or understandingly and deliberately entered into the agreement intending in some way to accomplish the purpose or goal by this common plan or joint action. . . .

DA625-628. The court did not include an instruction that Cardona could not, as a matter of law, conspire with a government agent. Nor did Cardona's trial counsel request such an instruction.

The court also instructed the jury on drug quantity in the context of the conspiracy count as follows:

> You may consider that the quantity of cocaine was reasonably foreseeable to a defendant if the defendant knew or should have known that such a quantity was involved in the conspiracy. When determining the quantity of cocaine that was reasonably foreseeable to a defendant, it is proper to consider the amount of cocaine involved in the overall conspiracy, including quantities of cocaine, if any that were distributed, before the defendant joined the conspiracy, if the defendant reasonably should have known what those quantities were. . . .

DA630-631. Cardona's trial counsel did not object to the quantity instruction.

B. Governing law and the standard of review

"This Court is generally disinclined to resolve ineffective assistance claims on direct review." *Gaskin*, 364 F.3d at 467 (citation omitted); *see also United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) ("this Court has expressed a baseline aversion to resolving ineffectiveness claims on direct review") (citation omitted). "Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue." *Khedr*, 343 F.3d at 100 (citing *Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998)).

The Supreme Court has held that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance" because the district court is "best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro v. United States*, 538 U.S. 500, 504, 505 (2003). "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 504-505. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. . . . inquiry into counsel's conversations

with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (citations omitted). Accordingly, the Supreme Court explained that few ineffectiveness claims "will be capable of resolution on direct appeal." *Massaro*, 538 U.S. at 508.

Nevertheless, direct appellate review is not foreclosed. This Court has held that "[w]hen faced with a claim for ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). "The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting *Khedr*, 343 F.3d at 100).

Even where the merits of an ineffective assistance are considered, a defendant seeking to overturn a conviction bears "a heavy burden." *Gaskin*, 364 F.3d at 468. He is required to demonstrate both: (1) that counsel's performance

was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 at 687, 694); *accord United States v. Campbell*, 300 F.3d 202, 214 (2d Cir. 2002); *United States v. Trzaska*, 111 F.3d 1019, 1029 (2d Cir. 1997).

"Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 467. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Moreover, judicial scrutiny of an attorney's performance must be highly deferential and must avoid "the distorting effects of hindsight." *Id.* at 689. "The court's central concern is not with 'grad[ing] counsel's performance,' but with discerning 'whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" *United States v. Aguirre*, 912 F.2d 555,

560 (2d Cir. 1990) (quoting *Strickland*, 466 U.S. at 696-97 (internal citations omitted)). The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections. *See Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

As to the first prong of *Strickland*–whether counsel's performance was unreasonable–this Court has held that the defendant has the burden of showing that "his trial counsel's performance 'fell below an objective standard of reasonableness.'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (quoting *Strickland*, 466 U.S. at 687-88 (1984)).

As to the second prong of *Strickland*–whether the defendant can establish prejudice–"[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland,* 466 U.S. at 690-691. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (internal quotation marks omitted). "That requires a sub-

stantial, not just conceivable, likelihood of a different result." *Id.* (internal quotation marks omitted). "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland,* 466 U.S. at 694.

Finally, Fed. R. Crim. P. 30(c) provides, in pertinent part, that "[a] party who objects to any portion of the [jury] instructions or failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." This rule further provides that "[f]ailure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)," that is plain error review.

Applying the plain error standard, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)). "[T]he defendant bears the

burden of establishing prejudice." *United States v. Logan*, 419 F.3d 172, 179 (2d Cir. 2005).

Plain error review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

1. Cardona's claims of ineffective assistance of counsel should not be addressed on direct appeal.

On appeal, Cardona does not challenge specific jury instructions given by the district court. Instead, he raises only claims of ineffective assistance of counsel stemming from his trial counsel's failure to challenge specific jury instructions. These claims should be dismissed so that Cardona may present them in a habeas petition.

In a variety of circumstances, this Court has opted to dismiss claims of ineffective assistance of counsel in favor of their presentation in subsequent § 2255 motions. For example, in *United States v. Venturella*, 391 F.3d 120 (2d Cir. 2004),

the defendant asserted, for the first time on appeal, an ineffective assistance of counsel claim based upon, *inter alia*, her counsel's alleged unprofessional comments to the jury, failure to call numerous witnesses, and failure to utilize readily available exculpatory evidence. *Id.* at 134-135. Noting that the "[direct] review of ineffective assistance of counsel claims is discretionary and should not be invoked lightly," the Court declined to entertain the ineffective assistance claim, leaving the defendant free to raise her claim in a subsequent § 2255 motion. *Id.* at 135 (citations and internal quotation marks omitted). And in *United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006), the Court declined to review the defendant's ineffective-assistance claims on direct appeal, noting that "[w]here the record on appeal does not include the facts necessary to adjudicate a claim of ineffective assistance of counsel, our usual practice is not to consider the claim on the direct appeal, but to leave it to the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255." *See also United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003) (refusing to consider ineffective assistance claim in light of its "baseline aversion to resolving ineffectiveness claims on direct review" and the Supreme Court' stated preference for resolving such claims in the context of § 2255 motions).

Here, the bases for Cardona's claims of ineffective assistance were not raised in the district court and did not benefit from additional fact-finding to give trial counsel the opportunity to explain his rationale for choosing to object or not object to specific jury instructions. Without awareness of trial counsel's state of mind and trial strategy, the reasonableness of his approach in dealing with the jury instructions cannot be fairly evaluated. As this Court has repeatedly instructed, "except in highly unusual circumstances," the attorney whose performance is challenged should be afforded an "opportunity to be heard and to present evidence, in the form of live testimony, affidavits or briefs" to explain the decision-making process. *See Sparman*, 154 F.3d at 52; *see Khedr*, 343 F.3d at 99-100.

Finally, a defendant cannot succeed on an ineffective assistance claim unless he can also show a reasonable probability that, but for counsel's deficient performance, the result of his trial would have been different. *See Strickland*, 466 U.S. at 694. "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The district court is in the best position to render factual findings in the first instance as to whether any alleged deficiencies were prejudicial to the outcome of a trial. Indeed, the district court's first-hand knowledge of the totality of the trial record

places it in the best position to assess any prejudice to a defendant by the introduction of such evidence within the larger picture of the Government's entire body of evidence presented at trial.

2. Cardona's trial counsel did not render ineffective assistance as the jury instructions were proper.

Even on their merits, and based on the present record, the ineffective assistance claims fail because trial counsel's performance was not deficient. As to the conspiracy instruction, the Government acknowledges that an agreement to conspire may come into being only when at least two culpable co-conspirators agree to violate the law and that "a person who enters into an agreement while acting as an agent of the government, either directly or as a confidential informant, lacks the criminal intent to necessary to render him a bona-fide co-conspirator." *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997). But, here there was ample evidence of an agreement between Cardona and Alvarez to possess with the intent to distribute 30 kilograms of cocaine, which was sufficient for a conviction on the conspiracy count.

After Morales-Gomez checked into the Meriden Inn, he received a call from Cardona indicating that he would be sending another party to obtain the cocaine. DA581. Cardona then called

Alvarez. GA665-666. Shortly thereafter, Alvarez arrived at the Meriden Inn, met with Morales-Gomez at his room, advised that he was there to pick up the cocaine and took possession of the cocaine. DA582-583. Shortly before Alvarez's arrest, he and Cardona spoke again via cell phone. GA665-666. Under these facts, the jury could have reasonably concluded that a conspiratorial agreement to violate the narcotics laws existed and that Cardona and Alvarez were parties to that agreement. While Morales-Gomez's actions during the time that he served as a cooperator for the controlled delivery cannot make him a co-conspirator, "a government agent may serve as a link between genuine conspirators." *United States v. Medina*, 32 F.3d 40, 44 (2d Cir. 1994).

Moreover, Cardona's argument that the jury should have been instructed that he could not conspire with a government agent ignores the fact that he and Morales-Gomez entered into a conspiratorial agreement encompassing the transport and delivery of 30 kilograms of cocaine on two occasions, well before the time when Morales-Gomez became a cooperator. *See United States v. Hurtado*, 47 F.3d 577, 586 (2d Cir. 1995) (holding that instruction in drug conspiracy prosecution that defendant could not be found to have conspired with government agent was not warranted where defendant was charged

with conspiring with informant prior to informant's arrest and cooperation).

To the extent that Cardona uses his ineffective assistance claim to argue now that none of Morales-Gomez's statements made after he became a cooperator should have been used to prove the existence of a conspiracy, his argument fails. Any conversations involving Morales-Gomez after he became a cooperator, including Cardona's own admissions, were certainly relevant evidence as to the existence of the agreement to transport and deliver cocaine that was reached prior to when Morales-Gomez became a cooperator. And those conversations were certainly relevant to the existence of an ongoing conspiratorial agreement between Cardona and Alvarez to obtain the cocaine. *See United States v. Deitz*, 577 F.3d 672, 681 (6th Cir. 2009) (holding that, although conversations between a defendant and a government cooperator cannot establish a conspiracy, they may be used as evidence of a conspiratorial agreement between defendant and other conspirators).

In sum, Cardona's position ignores the fact that he was charged with conspiring with Alvarez, not Morales-Gomez, and that Morales-Gomez was properly considered to be a co-conspirator prior to when he decided to cooperate. Under these circumstances, a jury instruction that Cardona could not conspire with a government agent was not warranted. For these

same reasons, Cardona cannot demonstrate any prejudice resulting from trial counsel's failure to request such an instruction. Had the instruction been requested, the district court would not have given it. And had the district court given it, it would not have affected the verdict because there was ample evidence from which the jury could have found the existence of a conspiratorial agreement independent of the interaction between Cardona and Morales-Gomez after Morales-Gomez became a cooperator.

Cardona's second claim of ineffective assistance is likewise meritless. He argues that trial counsel was ineffective for failing to request an instruction that a defendant cannot be held responsible for drugs distributed by a conspiracy before he joins it. But there was no evidence that warranted such an instruction.

The government offered evidence of two discrete transactions, both of which occurred during the time period of the charged conspiracy and both of which directly involved Cardona. First, Morales-Gomez testified that Cardona met him in Arizona towards the end of October 2009 and hired him to transport 30 kilograms of cocaine to Connecticut in November 2009. DA554-561. Second, Morales-Gomez testified that he met Cardona in early December 2009 and took possession of another 30 kilograms of cocaine from him, with orders to transport it to Connecticut. DA565-569. The Government offered no other

quantity evidence. Thus, as the evidence involved only transactions which occurred during the time frame of the charged conspiracy and which directly involved Cardona, the instruction now sought by Cardona would have been entirely irrelevant and had no effect on the verdict. As a result, he can establish neither deficient performance, nor prejudice.

Conclusion

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

Dated: July 23, 2013

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,901 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.

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