ORAL ARGUMENT NOT YET SCHEDULED

No. 15-3027

United States Court of Appeals

for the District of Columbia Circuit

Carlos Aguiar,

Appellant,

v.

United States of America,

Appellee.

On Appeal from the United States District Court for the District of Columbia (No. 1:104-cr-355-CKK-3) (Kollar-Kotelly, J.)

APPELLANT'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties are Carlos Aguiar, the Defendant–Appellant, and the United States of America, the Appellee. This Court appointed Steven H. Goldblatt as counsel for Aguiar. There are no amicus parties or intervenors.

B. Rulings under Review

1. The February 27, 2015, final judgment entered by Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia, denying Aguiar's February 9, 2015, "traverse to the government's answer" that the court treated as a motion for reconsideration of its February 12, 2015, judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. A1500; A1491; A1481; A1437.*

2. The special panel referred to this Court, for its consideration, a motion for the special panel to reconsider its denial of a certificate of appealability on an ineffective-assistance-of-counsel claim concerning Aguiar's decision to reject a plea offer. *See* Order (No. 15-3027) (Dkt. 1623013) (D.C. Cir. July 5, 2016).

C. Related Cases

The habeas case on review has not previously been before this Court. Counsel is aware of one related case. On June 23, 2016, this Court granted Aguiar leave to file a second-or-successive habeas motion. *See In re Aguiar* (No. 16-3043) (Dkt. 1621213)

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* The citation, "A__," is to the Appendix.

(D.C. Cir. June 23, 2016). That motion is being held in abeyance pending the Supreme Court's decision in *Sessions v. Dimaya*, No. 15-1498. *See Morrow v. United States*, No. 1:104-cr-355 (Dkt. 963) (D.D.C. June 23, 2016), (Dkt. 975) (D.D.C. May 22, 2017).

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INTRODUCTION

A special panel of this Court granted Aguiar a certificate of appealability ("COA") on one issue: whether the district court, in reviewing Aguiar's habeas motion, erred in holding that Aguiar's counsel was not ineffective for failing to challenge certain courtroom closures. The special panel appointed counsel to brief that issue, but the special panel declined to issue a COA on other issues.

Aguiar moved the special panel to reconsider its decision not to issue a COA on the following, particular issue: whether the district court erred in holding that Aguiar's counsel was not ineffective for failing to explain the sentencing consequences, under 18 U.S.C. § 924(c), of rejecting the government's plea offer. The special panel referred Aguiar's request for reconsideration to the merits panel and directed the parties to address, in their appellate briefs: (i) "the appropriate vehicle for seeking reconsideration of" the special panel's COA denial; (ii) the merits of the plea-bargain issue. *See* Order (Dkt. 1660327) (Feb. 9, 2017). Appointed counsel has briefed those issues here, as well.

It also bears mention that, while this appeal was pending, this Court granted Aguiar leave to file a second-or-successive habeas motion.[1] In that habeas motion, Aguiar challenges the constitutionality of his 18 U.S.C. § 924(c) sentences, arguing that § 924(c) has a residual clause that is materially identical to the residual clause in 18 U.S.C. § 924(e), which the Supreme Court deemed unconstitutionally vague in *Johnson v. United*

[1] *In re Aguiar*, No. 16-3043 (Dkt. 1621213) (D.C. Cir. June 23, 2016).

States, 135 S. Ct. 2551 (2015).[2] The district court has held that claim in abeyance pending the Supreme Court's decision in *Sessions v. Dimaya*, No. 15-1498.[3]

[2] Dist. Ct. Dkt. 963 (June 23, 2016).

[3] Dist. Ct. Dkt. 975 (May 27, 2017), at 9.

STATEMENT OF JURISDICTION

I. District Court Jurisdiction

On September 12, 2012, Aguiar filed a *pro se* motion to vacate his sentence under 28 U.S.C. § 2255. A1323. The district court had subject matter jurisdiction over Aguiar's habeas motion because it presented a federal question under 28 U.S.C. § 1331. *Id.*

II. Appellate Court Jurisdiction

This case's procedural history is unusual. On February 12, 2015, the district court denied Aguiar's habeas motion, without holding an evidentiary hearing, and declined to issue a COA. A1437; A1481. The ruling was not a final, appealable judgment because the court had not considered Aguiar's "traverse," which Aguiar had dated February 2, 2015. A1428. The "traverse" had reached the courthouse mailroom on February 9, 2015, but the court did not become aware of it until February 25, 2015—after the court had denied Aguiar's habeas motion. A1492. In response to a supplemental brief by the government, the "traverse" advanced new arguments and facts regarding defense counsel's ineffectiveness during plea bargaining. A1428–36 (attaching affidavit). Those arguments "differ[ed] slightly from" Aguiar's original arguments. A1494.

Under the mailbox rule, the filing date for a *pro se* prisoner's filing is when the prisoner gives it "to prison officials for delivery to the district court." *See Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998). Thus, Aguiar filed the "traverse" on February 2, 2015. A1434 (certificate of service).

The court elected to treat Aguiar's February 2, 2015, "traverse" as if it were a

"motion for reconsideration of" the court's February 12, 2015, judgment. A1491–93. On February 27, 2015, the court addressed the issues raised in the "traverse" and denied "reconsideration." A1491; A1500.

In a *pro se* filing also dated February 27, 2015, Aguiar moved the court to alter, under Federal Rule of Civil Procedure 59(e), its February 12, 2015, judgment. A1483. The motion advanced new arguments regarding Aguiar's habeas claims. A1503–04. The motion was timely, as the courthouse mailroom had received it on March 9, 2015, within twenty-eight days of the February 12, 2015, order. A1483; *see* Fed. R. Civ. P. 59(e) (twenty-eight days). The court denied the motion on May 19, 2015. A1502.

On April 16, 2015, Aguiar filed a *pro se* notice of appeal. A1501. The notice stated that Aguiar was appealing from the district court's judgment entered on February 27, 2015. *Id.* The notice was timely. *See* Fed. R. App. P. 4(a)(1)(B)(i) (sixty days).

There are three bases for this Court's jurisdiction. *First*, after the district court entered its February 12 order, issues remained in the case—namely, the issues raised in Aguiar's February 2 "traverse." Because the "traverse" was pending when the court entered its February 12 order, that order was not a final judgment. Rather, the final judgment was the February 27 order, which resolved the "traverse," disposed all claims of all parties, and "disassociate[d]" the court from the case. *See Dhiab v. Obama*, 787 F.3d 563, 565 (D.C. Cir. 2015) (defining "final" judgment) (citation and punctuation omitted). Therefore, Aguiar was correct to appeal from the February 27 judgment, and his April 16 notice of appeal from that judgment vests jurisdiction in this Court, raising

the entire case for review.

Second, to the extent that the district court was correct to re-characterize Aguiar's *pro se* "traverse" as a "motion for reconsideration," the "traverse" was a motion timely filed under Rule 59(e), as Aguiar had filed it within twenty-eight days of the February 12 order—in fact, beforehand, on February 2. *See Moy v. Howard Univ.*, 843 F.2d 1504, 1505 (D.C. Cir. 1988) (construing filing as Rule 59(e) motion). Therefore, Aguiar was correct to appeal from the February 27 judgment, and his April 16 notice of appeal from that judgment vests jurisdiction in this Court, raising the entire case for review. *See Hunter v. Metro. Life Ins. Co.*, 2003 WL 22240321, at *1 (D.C. Cir. Sept. 24, 2003) ("An appeal from the denial of a timely Rule 59(e) motion brings up the underlying judgment for review.").

Third, Aguiar's Rule 59(e) motion to alter the February 12 order—that is, the motion dated February 27—also has the effect of making the April 16 notice of appeal timely for all the district court's orders. That motion was denied on May 19. Under Federal Rule of Appellate Procedure 4(a)(4)(B)(i), on that date, the denial activated Aguiar's previously-filed notice of appeal. Aguiar's identifying the February 27 order, rather than the February 12 order, in his notice is irrelevant, as it is clear that he was attempting to appeal from the elusive final judgment in this case. *See Foman v. Davis*, 371 U.S. 178, 181 (1962) (treating the notice of appeal "as an effective, although inept, attempt to appeal from the judgment sought to be vacated").

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Aguiar's counsel could not have been ineffective for failing to challenge the closure of general voir dire and the almost week-long administration of individual voir dire, along with pretrial litigation, from inside a private backroom behind the courtroom.

2. Whether this Court may expand a COA to encompass an uncertified issue, either through a motion for reconsidering a special panel's initial, interlocutory COA denial, or through the merit panel's inherent authority to certify an issue.

3. If the answer to the second question is affirmative, then a third question is on review: Whether the district court erred in holding that Aguiar's counsel could not have been ineffective for failing to warn Aguiar that, if he rejected the government's plea offer, the government would respond—as it did—by stacking two 18 U.S.C. § 924(c) charges against him, which would substantially enhance his mandatory minimum sentencing exposure.

STATEMENT OF THE CASE

This statement traces the aspects of trial and appeal that are relevant to the ineffective-assistance issues under review, before addressing the collateral proceedings below that are the subject of this appeal.

I. Prosecution, Plea Bargaining, & Trial

In the summer of 2004, the government initiated a prosecution against Aguiar and seven co-defendants. A1439. The government alleged that Aguiar and his co-defendants had committed a string of armed bank robberies, from January 2004 to June 2004, in the D.C. metro area. A61–64. Aguiar had allegedly participated in four of them. *Id.* The government filed a superseding indictment on August 5, 2004. A67. That indictment charged Aguiar with one count of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371, and two counts of armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) & (d) and 2. A67–75.

Although that indictment did not charge a violation of 18 U.S.C. § 924(c), the armed bank robberies implicated this oft-used statute, which prohibits using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a federal crime of violence. *Id.* § 924(c)(1)(A). The statute prescribes a mandatory minimum imprisonment term depending on the type of offense, which is imposed in addition to, and must run consecutively to, any other imprisonment term. *Id.* § 924(c)(1)(A) & (D). If the defendant uses a semiautomatic assault weapon, the mandatory minimum penalty is a ten-year imprisonment term. *Id.* § 924(c)(1)(B)(i). The statute further prescribes a

mandatory minimum imprisonment term of twenty-five years, for each "second or subsequent conviction" of a § 924(c) offense; that term is imposed in addition to, and must run consecutively to, any other imprisonment term. *Id.* § 924(c)(1)(C)(i).

The government extended a plea offer to Aguiar by a letter dated September 17, 2004. A1446–47. That offer required him to plead to one § 924(c) violation, which—as noted—the government had not yet charged. *Id.* Aguiar did not accept the offer; it expired on September 27, 2004. *Id.*

On November 9, 2004, the government filed a second superseding indictment, adding several charges, including two § 924(c) counts. A76–109. Under that indictment, Aguiar's mandatory minimum sentencing exposure increased by twenty-five years by virtue of the second § 924(c) count alone. A1314-16.

As this timeline illustrates, after Aguiar declined the plea offer, the government escalated its charges against him:

- **Indictment (Aug. 3, 2004) & First Superseding Indictment (Aug. 5, 2004)**
  - *no* counts of using a firearm in relation to a federal crime of violation, 18 U.S.C. § 924(c);
  - one count of conspiracy to commit offenses against the United States, 18 U.S.C. § 371;
  - two counts of armed bank robbery, 18 U.S.C. §§ 2113(a) & (d) and 2.

- **Rejected Plea Offer (Sept. 17, 2004 – Sept. 27, 2004)**
  - one count of using a firearm in relation to a federal crime of violence, 18 U.S.C. § 924(c);
  - one count of RICO conspiracy, 18 U.S.C. § 1962(d);
  - one count of felon-in-possession-of-a-firearm, 18 U.S.C. § 922(g).

- **Second Superseding Indictment (Nov. 9, 2004)**
  - two counts of using a firearm in relation to a federal crime of violence, 18 U.S.C. § 924(c);
  - one count of conspiracy to commit offenses against the United States, 18 U.S.C. § 371;
  - two counts of armed bank robbery, 18 U.S.C. §§ 2113(a) & (d) and 2;
  - one count of RICO conspiracy, 18 U.S.C. § 1962(d);
  - two counts of felon-in-possession-of-a-firearm, 18 U.S.C. § 922(g).[4]

A1446–51.

[4] On February 15, 2005, the government filed a third superseding indictment, which charged an additional (third) § 922(g) count. A110–142. That is the indictment under which Mr. Aguiar went to trial and was convicted. A1319–20.

On January 31, 2005—after the plea offers had formally expired, and after the second superseding indictments had been filed—the trial judge conducted a hearing to place the defendants' plea-offer rejections "on the record," and to ensure that the defendants had not "change[d] their mind[s]" in the wake of the recent *Booker* opinion and recent DNA results. A150:22–152:4. The judge noted that the hearing was meant to anticipate the defendants' potential appellate and habeas arguments that they had never received "a full discussion of the plea." A157:3-21.

At the hearing, Aguiar confirmed that he had discussed the plea offer with counsel and had decided to reject it. A178:7-22. The prosecutor stated that the "major difference[]" between Aguiar's accepting the plea offer and proceeding to trial was "whether or not there are one or more than one conviction under 924(c)."A177:21–178:2. Yet the prosecutor added: "But frankly, Your Honor, adding, all it really does to the calculation is add back in the three additional level that he otherwise would get for acceptance of responsibility." A178:3-6.

Aguiar went to trial with several co-defendants and was convicted on all charges. He was sentenced to sixty years imprisonment: thirty-five years on the two § 924(c) counts—ten years for the first, plus twenty-five years for the second—which ran consecutively to twenty-five years on the remaining counts.[5] A1314–16; A1319–20.

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[5] The remaining counts were: one count of conspiracy to commit offenses against the United States, 18 U.S.C. § 371; two counts of armed bank robbery, 18 U.S.C. §§ 2113(a) & (d) and 2; one count of RICO conspiracy, 18 U.S.C. § 1962(d); three counts of felon-in-possession-of-a-firearm, 18 U.S.C. § 922(g). A1319–20.

II. Jury Selection

A. The judge conducted general voir dire in a closed courtroom.

On the morning of April 5, 2005, the trial judge brought the jury pool into the "ceremonial courtroom," the courthouse's largest courtroom, for general voir dire. A303:4-10; A1454. In one session, the judge recited forty general-voir-dire questions to all the prospective jurors. A1454. Afterward, the judge explained that it chose that approach for efficiency's sake. A364:9-11 (explaining to the prospective jurors that "instead of doing this several times we brought you all in"). As the judge recited the questions, the prospective jurors recorded their responses on notecards. A322:4–364:6.

While jury selection was in progress, a court security officer guarded the entrance to the courtroom, barring all persons except for prospective jurors from entering. A1331 ¶¶ 4, 5; A1333 ¶¶ 4, 5. Aguiar's mother and sister attempted to enter the courtroom to view jury selection, but the court security officer blocked their entry, informing them that they "could not enter because the jury selection had started," and that "nobody was being allowed to enter until the jury selection was finished." *Id.*

Aguiar had asked his mother and sister to attend jury selection "to show family support"; they understood and promised to attend. A1329 ¶ 2; A1331 ¶ 7; A1333 ¶ 7. When Aguiar noticed that they were absent from the courtroom during jury selection, he asked counsel to investigate. A1329 ¶ 3.

General voir dire occupied the entire morning. *Compare* A307 (showing that the court session began at 9:15 a.m.), *with* A370:2 (showing that general voir dire concluded

around 12:30 p.m.). The judge then broke down the jury pool into smaller groups and instructed the potential jurors to return at staggered intervals for individual voir dire. A365:21–367:13.

B. From April 5, 2005, through April 11, 2005, the judge held court—including individual voir dire—in a private backroom.

The judge conducted individual voir dire in a private backroom, the entrance to which was behind the judge's bench in the ceremonial courtroom, and which was typically used by the jury to congregate and deliberate. A314:1-2 ("We'll move into the back room. They'll come back and then we'll start."); A1455. The judge chose that approach for comfort's sake. A318:21-24 ("Because it's going to be a little hard here to try to have a discussion at the bench about stuff. So … all we're going to do is [general-voir-dire] questions and then we'll move into the back."); A456:11-14 ("And the difficulty is all the other rooms are much smaller than this. So rather than cramming us in, I thought we could keep this as long as possible.").

For each prospective juror, individual voir dire proceeded inside the backroom in this way: The prospective juror entered; the judge and counsel asked the prospective juror questions; the judge then excused the prospective juror, asking him or her to exit through a door that opened into a hallway, while the judge and counsel remained inside; counsel then argued motions to strike the prospective juror for cause, which the judge heard and decided. A317:5-7; *e.g.*, A371:15–399:10 (individual voir dire for Prospective Juror 2366). Throughout individual voir dire, the only persons allowed inside the

backroom were the judge, the several co-defendants and their attorneys, the multiple prosecutors, Deputy U.S. Marshals, and—when summoned—a prospective juror. A1460–61. The judge conducted individual voir dire in this way from April 5, 2005, through April 11, 2005. A1455.

There was frequently a lag between one prospective juror's exit and the next prospective juror's entry. The judge used some of those lags to preside over legal proceedings from inside the backroom. On April 6, 2005, for example, while awaiting the next prospective juror, the judge presided over oral argument between a prosecutor and a defense attorney about the admissibility and weight of the prosecution's expert testimony on DNA evidence. A556:24–566:22. The judge considered each position and set forth its view. A564:18 ("Is that your position?"); A563:11-12 (informing defense counsel that it was "missing the point"); A566:1-22 (setting forth its view).

Later that day, the judge presided over oral argument between a prosecutor and a defense attorney about the prosecution's belated submission of evidence for fingerprint analysis. A571:10–573:18. The judge considered each position and set forth its view. A571:10-11 (answering, "Go ahead," to prosecutor's inquiry, "Could I raise an issue[?]"); A572:13-17 ("Government?"—inviting the prosecutor to respond to the defense attorney's rebuttal); A573:12-20 (setting forth its view and wrapping up the argument: "[w]e've got a juror, so I'm going to talk to the juror").

On April 8, 2005, the judge presided over oral argument between the prosecution and defense counsel about a joint testimonial stipulation. A1000:2–09:10. The

prosecution was planning to establish at trial that the defendants had stolen several get-away cars; but rather than inviting the automobile-owners to testify at trial, the prosecution had asked each defendant's attorney to have his or her client stipulate to the owners' would-be testimony. A1000:4-11. One defendant's attorney declined to enter his client into the stipulation, arguing that she would "move to sever" her client from the stipulation because she did not believe that her client would "benefit." A1002:11-14. Another defendant's attorney argued that he did not "see any interest in [his client] joining in any stipulation that makes the government's ability to prove their case any easier." A1003:23–04:6. The judge considered each position and set forth its view: "[T]actically, if you want to put the government through its proof, it's up to you. I've always found live witnesses tend to be more sympathetic for the most part, though. … Let's get the jury in, get on with our task here." A1009:7-11.

After individual voir dire had yielded fifty-two prospective jurors, the judge brought the prosecution and defense counsel into an open courtroom for peremptory strikes. A1289:23-25 (referencing "Courtroom 10"). Once the jury was empaneled, the trial continued. It ended in Aguiar's conviction and sentencing, as noted.

III. Post-Conviction Proceedings

Aguiar and his co-defendants appealed. *United States v. Burwell*, 642 F.3d 1062 (D.C. Cir. 2011), *reh'g en banc granted, judgment vacated* (Oct. 12, 2011), *opinion reinstated, aff'd*, 690 F.3d 500 (D.C. Cir. 2012). The primary issue was whether the judge had properly admitted other-crimes evidence. 642 F.3d at 1065–68. This Court affirmed

Aguiar's conviction and sentence. *Id.* at 1071.[6] Aguiar and his co-defendants did not raise on direct appeal the issues posed here.

On September 12, 2012, Aguiar filed a *pro se* motion to vacate his sentence under 28 U.S.C. § 2255. A1323–28. The motion raised five claims; two are relevant here. First, Aguiar argued that his counsel was ineffective for failing to challenge the exclusion of the public from general and individual voir dire, which violated his Sixth Amendment right to a public trial. A1348–49. Second, Aguiar argued that his counsel was ineffective for failing to explain that, if he rejected the plea, the government would respond by stacking two 18 U.S.C. § 924(c) charges against him, which would substantially enhance his mandatory sentencing exposure. A1340.

On April 8, 2013, the government opposed Aguiar's § 2255 motion. A1365. The government argued that Aguiar's counsel could not have been ineffective for failing to challenge "de minimis" voir-dire closures. A1385. The government further argued that Aguiar's plea-bargain claim was "sour grapes over a sentence once pronounced": At the January 31, 2005, hearing, the government pointed out, Aguiar had testified that he understood the plea offer's terms and the plea offer's sentencing exposure. A1375–77.

On December 16, 2014, the district court ordered the government to provide,

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[6] The *en banc* proceeding did not concern Aguiar. A co-defendant, Bryan Burwell, had been convicted under 18 U.S.C. § 924(c)(1)(B)(ii) for using a machinegun during the crime spree. The *en banc* court affirmed his conviction, declining to overturn circuit precedent that the government need not prove the defendant *knew* the weapon was a machinegun. 690 F.3d at 516.

through supplemental briefing, information on the second claim: when the government had made the plea offer, and whether the government had wired Aguiar's plea offer to his co-defendants' plea offers. A1411. On January 14, 2015, the government filed that supplemental brief, attaching the plea offer and informing the court: the government made the plea offer on September 17, 2004; it expired on September 24, 2004; it was unwired. A1414–15. On February 9, 2015, Aguiar responded to the government's supplemental brief with a *pro se* "traverse," which advanced new arguments and facts about his counsel's ineffectiveness during plea bargaining. A1428–36 (attaching affidavit). Specifically, Aguiar argued that his counsel was ineffective for not showing or explaining the plea offer to him. *Id.* As the court noted, that contention "differ[ed] slightly from his original" contention. A1494.

On February 12, 2015, the court denied Aguiar's habeas motion on all his claims and declined to issue a COA. A1480. The court declined to hold an evidentiary hearing because, in its view, "the motion and files and records of the case conclusively show that [Aguiar] is entitled to no relief." A1442–43 (citing 28 U.S.C. § 2255(b)). On Aguiar's first claim, the court held that, because the voir-dire closures were "trivial," Aguiar's counsel could not have been ineffective for failing to challenge them; in any event, Aguiar had failed to show that his counsel's failure had prejudiced him. A1463 & n.18. On Aguiar's second claim, the court held that Aguiar's counsel could not have been ineffective for "failing to explain the sentencing implications of convictions for two violations of § 924 at a time when Aguiar was not charged with these violations." A1450.

In rendering its February 12, 2015, judgment, the court was unaware that Aguiar had filed a "traverse" on February 2, 2015. A1491–92. The court treated the "traverse" as if it were a "motion for reconsideration of" the February 12, 2015, judgment. *Id.* On February 27, 2015, the court denied "reconsideration." A1499. The court held that Aguiar's counsel could not have been ineffective for failing to explain or show the plea offer to Aguiar because, as the court found, "he was clearly informed of the pertinent terms of the plea offer and rejected it nonetheless." *Id.*

On May 19, 2015, the court denied a motion that Aguiar had filed—on February 27, 2015, and under Federal Rule of Civil Procedure 59(e)—for the court to alter its February 12, 2015, judgment. A1510. The court rejected Aguiar's new argument that it had applied the incorrect legal standard in denying him habeas relief, and Aguiar's argument that it had incorrectly deemed the voir-dire closures "trivial." A1504–07.

IV. Special Panel Proceedings in This Court

On July 5, 2016, a special panel of this Court appointed counsel for Aguiar and granted him a COA on the first, voir-dire closure issue. *See* Order (Dkt. 1623013) (July 5, 2016). On October 12, 2016, appointed counsel moved the special panel to reconsider its denial of a COA on the plea-bargain issue, under Federal Rule of Appellate Procedure 27. *See* Mot. (Dkt. 1640688) (Oct. 12, 2016); Reply (Dkt. 1646198) (Nov. 15, 2016). In that motion, appointed counsel argued that Aguiar had satisfied the standard for a COA set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The government opposed the motion. *See* Gov't Resp. (Dkt. 1645050) (Nov. 8, 2016).

The special panel referred the motion to the merits panel and directed the parties to address, in their appellate briefs, two additional issues. First, "the threshold issues discussed in their [appellate] pleadings concerning the appropriate vehicle for obtaining review of the denial in part of appellant's motion for a certificate of appealability." Second, the plea-bargain issue's merits. *See* Order (Dkt. 1660327) (Feb. 9, 2017).

SUMMARY OF ARGUMENT

The district court denied Aguiar's habeas motion without affording him an evidentiary hearing because, in its view, "the motion and files and records of the case conclusively show that [Aguiar] is entitled to no relief." A1442–43 (citing 28 U.S.C. § 2255(b)). That conclusion is wrong. There are three issues on appeal.

1. First, the district court erred in holding that Aguiar's counsel could not have been ineffective for failing to challenge the voir-dire closures. The court brushed aside the closures as too "trivial" to implicate the Sixth Amendment public-trial right or to sustain a *Strickland* claim. A1460–62. But that assessment is incorrect. This Court should reverse the district court's judgment on this claim and hold that Aguiar has established, on this record, that he was denied effective assistance. Alternatively, this Court should vacate the judgment on this claim and remand for a hearing.

The relevant facts are not in dispute. On the morning of April 5, 2005, the trial judge conducted general voir dire in a closed courtroom; then, from the afternoon of April 5, through the afternoon of April 11, the judge conducted individual voir dire from a site that was even more remote than a closed courtroom: the private backroom behind the courtroom. For almost one week, the judge held court from inside that backroom, administering individual voir dire and presiding over pretrial arguments about evidentiary issues. And the judge proceeded in private without beforehand making any specific, on-the-record findings to justify its decision—findings which, under the Supreme Court's trilogy of *Presley*, *Waller*, and *Press-Enterprise*, and this Court's

congruent decision in *Cable News*, are critical for safeguarding the Sixth Amendment's presumption of openness. *See Presley v. Georgia*, 558 U.S. 209 (2010); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Super. Ct. of Cali.*, 464 U.S. 501 (1984); *Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1049 (D.C. Cir. 1987) ("Voir dire proceedings henceforth shall be conducted in accordance with this opinion."). In light of these clear authorities, in no sense were the voir-dire closures at issue here mere "trivial" impositions on the Sixth Amendment right to a public trial.

Consequently, under *Strickland*'s performance prong, Aguiar's counsel was deficient in failing to challenge such severe violations of Aguiar's public-trial right. The contours of the public-trial right were so well settled that the Supreme Court and this Court proceeded by summary disposition in *Presley* and in *Cable News*, respectively. Not objecting, in turn, could not have been a viable strategic decision.

Under *Strickland*'s prejudice prong, furthermore, the voir-dire closures were serious enough to render the proceedings fundamentally unfair. Contrasting our case with *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1906 (2017), is illustrative. There, the trial judge conducted a two-day jury selection in a closed courtroom. The Supreme Court deemed the closure not to be prejudicial. *Id.* at 1913. But there, "the closure decision apparently was made by court officers rather than the judge"; "there were many members of the venire who did not become jurors but who did observe the proceedings"; and the closure did not cause the voir dire to be held in a "remote place." *Id.* Here, however, the trial judge deliberately elected to conduct individual voir dire—

along with pretrial litigation—from inside a remote backroom for almost one week. The only persons permitted inside, besides the judge, were the defendants, their attorneys, the prosecutors, court officers, and one-at-a-time, a prospective juror. Although a run-of-the-mill, *Weaver*-style voir-dire closure will not sustain a *Strickland* claim, there is nothing typical—or trivial—about what happened during Aguiar's trial.

2. The district court also erred in holding that Aguiar's counsel could not have been ineffective for failing to explain the sentencing consequences of rejecting the government's plea offer. But before this merits panel may consider that plea-bargain issue, the panel must decide whether it may expand the COA to reach it.

First, this merits panel may do so by relying on the authority that the special panel delegated to it. After the special panel declined to issue a COA on the plea-bargain issue, Aguiar moved the special panel to reconsider its denial, under Federal Rule of Appellate Procedure 27. The special panel did not decide the motion; instead, it referred the motion to this merits panel. *See* Order (Dkt. 1660327) (Feb. 9, 2017).

Aguiar properly sought reconsideration of the special panel's COA denial via the mechanism of Rule 27. This Court's Handbook states, in the section describing Rule 27 motion practice: "If a party disagrees with the special panel's disposition of a motion, it may move for reconsideration by the same panel … ." *D.C. Cir. Handbook of Practice & Internal Procedures* (Jan. 26, 2017), at 31.

Although counsel filed the Rule 27 motion three months after the COA denial, the motion was timely. Neither the Federal Rules, nor the Local Rules, nor the

Handbook specifies a deadline for a Rule 27 motion. Because there was no time limitation, the special panel retained the discretion to revisit its initial, interlocutory ruling. The three-month gap caused the government no prejudice.

Because Aguiar properly sought reconsideration of the special panel's COA denial via Rule 27, it would have been appropriate for the special panel to have considered Aguiar's Rule 27 motion and granted it—provided that Aguiar had satisfied the *Slack* standard for a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that a COA is warranted if "reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong"). As explained below, Aguiar has satisfied the standard. This merits panel may now properly exercise the authority, which the special panel delegated to it, to certify the plea-bargain issue.

Second, putting aside motion practice, a merits panel has the inherent authority to expand a COA to encompass an additional issue, despite a special panel's decision not to certify it. *See, e.g.*, *ASARCO, Inc. v. F.E.R.C.*, 777 F.2d 764, 773 n.6 (D.C. Cir. 1985) ("The disposition of a motions panel may of course be reexamined during the merits panel's in-depth consideration of the case."). Other circuits have explicitly recognized this power. For good reason. The merits panel has the benefit of a complete record, full briefing, and oral argument, which could enable it to discern a reason for granting a COA that the special panel missed. In addition, a special panel's decision to grant or deny a COA is a threshold, jurisdictional inquiry—precisely the sort of inquiry that a merits panel has always had the authority to revisit.

3. The third question in this appeal is the plea-bargain issue's merits: whether the district court erred in holding that Aguiar's counsel could not have been ineffective for failing to explain the sentencing consequences, under 18 U.S.C. § 924(c), of rejecting the government's plea offer. In addressing this merits question, Aguiar will also address *Slack*'s threshold standard for a COA.

At bottom, the district court went astray by relying on the following purported rule: A defendant's lawyer cannot be ineffective for "failing to explain" the "sentencing implications of violations" that the government has not yet "actually charged." A1450–52. No such rule exists; this case shows why. This Court should vacate the district court's judgment on this claim and remand for a hearing.

In the underlying criminal prosecution, the government's central theory was that Aguiar had committed, with his co-defendants, *four* bank robberies while *armed with firearms*. So, from the prosecution's inception, the government could have charged Aguiar with multiple violations of 18 U.S.C. § 924(c). Under that statute, using a semiautomatic weapon in relation to a violent federal crime incurs a ten-year mandatory minimum imprisonment term, consecutive to any other sentence. A second § 924(c) count carries a twenty-five-year mandatory minimum imprisonment term, consecutive to any other sentence.

The government's first two indictments did not charge any § 924(c) violations. But then, the government offered a plea to Aguiar, which contained one yet-uncharged § 924(c) count. The government had thereby raised the specter of § 924(c) and all its

sentencing implications. Thus, competent counsel would have known the government's next move: If Aguiar rejected the plea offer, the government would file a superseding indictment with additional charges, including at least two § 924(c) counts. To be sure, the government had not yet "charged" those two counts "at the time that the plea offer was extended and expired without acceptance." A1451. But the risk of those two counts, and the second count's attendant twenty-five mandatory years, was obvious. For two reasons: (i) Aguiar's alleged criminal conduct was amenable to multiple § 924(c) charges; (ii) the government had included one yet-uncharged § 924(c) count in the plea offer itself. With those two facts in mind, along with a basic familiarity with the government's standard plea-bargaining practice, competent counsel would have needed only logic to have seen the two § 924(c) charges coming. And competent counsel would have explained that the second § 924(c) count would enhance Aguiar's mandatory sentencing exposure by twenty-five years.

Aguiar rejected the plea offer; an indictment with two § 924(c) counts followed. The ensuing trial resulted in Aguiar's conviction and a sixty-year sentence—of which twenty-five mandatory years, or 42%, arose from the second § 924(c) count alone. In his affidavit, Aguiar has sworn that his counsel did not completely advise him on § 924(c)'s sentencing consequences, and that, had he received competent advice, he would have accepted the plea offer and dodged his current fate.

Because the government's response—charging two § 924(c) violations—was a "clear," "easily determined," and *direct* consequence of rejecting the plea offer, the

district court erred in holding that Aguiar could not establish his counsel's *Strickland* deficiency. *See Padilla v. Kentucky*, 559 U.S. 356, 368–69 (2010) (deeming counsel deficient for failing to warn defendant about a plea-offer decision's *collateral* consequence). And because the "loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence," the court also erred in holding that Aguiar could not establish *Strickland* prejudice. *See Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

ARGUMENT

I. The district court erred in holding, on this record, that Aguiar's trial and appellate counsel could not have been ineffective for failing to challenge the voir-dire closures.

This Court settled the applicable standard of review in *United States v. Abney*, 812 F.3d 1079, 1087 (D.C. Cir. 2016). Where, as here, a habeas petitioner has brought an ineffective-assistance-of-counsel claim in a 28 U.S.C. § 2255 motion, this Court reviews *de novo* the district court's denial of that claim. *Id.* It affords no deference to the district court's "ineffective assistance analysis." *Id.*; *Strickland v. Washington*, 466 U.S. 668 (1984).

The district court denied Aguiar's claim without holding an evidentiary hearing. Under 28 U.S.C. § 2255(b), then, this Court should affirm the district court's denial only if its *de novo* review reveals that "the motion and the files and records of the case conclusively show that [Aguiar] is entitled to no relief." As the Eight Circuit has held: "Although we review a district court's decision to deny an evidentiary hearing for abuse of discretion, we are obligated to look behind that discretionary decision to the court's rejection of the claim on its merits, which is a legal conclusion that we review *de novo*." *Deltoro-Aguilera v. United States*, 625 F.3d 434, 436 (8th Cir. 2010) (citation and punctuation omitted).

A. The voir-dire closures violated Aguiar's right to a public trial.

The district court erred in holding that the voir-dire closures at issue here were too "trivial" to render Aguiar's counsel ineffective for failing to challenge them. 1460–63. As the Supreme Court recognized in *Presley v. Georgia*, 558 U.S. 209, 213 (2010), the

Sixth Amendment right to a public trial extends to jury selection. The Court's 2010 *Presley* decision relied on the Court's May 1984 *Waller* decision and the Court's January 1984 *Press-Enterprise* decision. *Presley*, 558 U.S. at 213–16 (relying on *Waller v. Georgia*, 467 U.S. 39 (1984) & *Press-Enterprise Co. v. Super. Crt. of Cali.*, 464 U.S. 501 (1984)). Together, this trilogy stands for the hornbook rule that a voir-dire closure violates a defendant's Sixth Amendment right to a public trial—unless the court satisfies a four-factor test *before* the closure:

(1) the court must "identify an[] overriding interest that is likely to be prejudiced absent the closure of *voir dire*";

(2) the court must ensure that the closure is "no broader than necessary to protect that interest";

(3) the court must "consider reasonable alternatives to closing the proceeding";

(4) the court must "make findings adequate to support the closure."

Presley, 558 U.S. at 213–15 (quoting *Waller*, 467 U.S. at 48); *accord Press-Enterprise*, 464 U.S. at 510 ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.") (citation and punctuation omitted); *United States v. Gupta*, 699 F.3d 682, 687 (2d Cir. 2012) ("[I]f a court intends to exclude the public from a criminal proceeding, it *must* first analyze the *Waller* factors and make specific findings with regard to those factors. If a trial court fails to adhere to this procedure, any intentional closure

is unjustified and will, in all but the rarest of cases, require reversal.").

This Court itself has long recognized that a trial judge may not close voir dire without justification. In *Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987), the trial judge, concerned about "personal privacy," permitted each prospective juror to decide whether his or her individual voir dire should be in open court or in camera. *Id.* at 1047. Five of the thirty chose open court. *Id.* But this Court summarily held that the trial judge's approach violated Supreme Court precedent, as the judge had not made "individualized findings," "sufficiently detailed to permit review at the appellate level," to justify the partial voir-dire closure. *Id.* at 1047–49. Nor had the judge considered "alternatives that might minimize the degree of the closure." *Id.* Acknowledging the "rich history and tradition of open criminal proceedings in English and American courts," and the Supreme Court's emphasis on the "value of openness," this Court stated: "Voir dire proceedings shall henceforth be conducted in accordance with this opinion." *Id.*

Here, the trial judge did not conduct voir dire in accordance with *Cable News Network*, *Presley*, *Waller*, or *Press-Enterprises*.[7] On the morning of April 5, 2005, the judge conducted the entirety of general voir dire in a closed courtroom; then, from the afternoon of April 5 through the afternoon of April 11, the judge conducted the entirety

[7] The Supreme Court's recent decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), has not altered the framework for determining whether a closure violated the Sixth Amendment. That decision addressed only the issue of *Strickland* prejudice. *Id.* at 1909, 1912, 1913.

of individual voir dire from a site that was even more remote than a closed courtroom: the private backroom behind the courtroom. For nearly one week, the judge held court proceedings from inside that backroom, administering individual voir dire and presiding over several pretrial arguments about evidentiary issues.

First, the judge implemented these severe voir-dire closures without beforehand articulating any valid, overriding reasons for doing so. Efficiency and comfort concerns are inadequate to justify such closures. *See Presley*, 558 U.S. at 215 ("If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."); *United States v. Owens*, 483, F.3d 48, 62 (1st Cir. 2007) (disregarding "convenience" concerns). Those unremarkable concerns are rendered even less adequate when they are weighed against Aguiar's competing interest in his family's presence. *See United States v. Agosto-Vega*, 617 F.3d 541, 548 (1st Cir. 2010) ("[W]hen considering the balance of factors supporting closure, courts should not minimize the importance of a criminal defendant's interest in the attendance and support of family and friends, … [which] is ineffective in absentia."). Even if those concerns were adequate, the district court's post-hoc explanations on habeas review cannot satisfy the *Presley-Waller* test. *See Presley*, 558 U.S. at 213 ("*Waller* provided standards for courts to apply *before* excluding the public from any stage of a criminal trial.") (emphasis added).

Second, the judge did not ensure that the closure was no broader than necessary. And *third*, the judge did not consider reasonable alternatives to its methods. Narrower

alternatives are readily apparent. For general voir dire, the judge could have "divid[ed] the jury venire panel to reduce courtroom congestion" and "reserve[ed] one or more rows for the public"—including Aguiar's mother and sister. *Presley*, 558 U.S. at 215. For individual voir dire, the judge could have employed what it has conceded is the current practice, which would have enabled Aguiar's family and the public to observe the proceeding: Now, "staff members … escort jurors from their seats in one courtroom into a different courtroom in order to conduct the individual questioning on the record in open court." A1461 n.16. In fact, the record reflects that, during the week of April 5, 2005, other courtrooms were available. A317:8-14; A967:11-12.

Fourth, the judge made no on-the-record, pre-closure findings to justify the closures and to enable an appellate court to review their lawfulness. *See Cable News*, 824 F.3d at 1049 (holding that, absent "individualized findings," "sufficiently detailed to permit review at the appellate level, it is not possible to conclude that closure is warranted") (citation and punctuation omitted).

B. The voir-dire closures were not trivial.

In *Perry*, this Court recognized that certain closures are too "trivial" to implicate the Sixth Amendment, even if the trial judge has failed to satisfy the four-part *Presley-Waller* test. *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007). But *Perry* itself illustrates the triviality exception's narrow scope. There, the trial court excluded only the defendant's eight-year-old son while keeping the courtroom otherwise open to the public. *Id.* at 887–88. This Court affirmed the lower court's conclusion that excluding a

single eight-year-old was "trivial." *Id.* at 890. In contrast, the voir-dire closures at issue here are highly and uniquely serious due to their duration and their nature. The public was excluded from the entirety of general voir dire and the entirety of individual voir dire—for nearly one week. The trial judge conducted individual voir dire—as well as other pretrial legal proceedings—from a location more remote than a closed courtroom: the private backroom behind the courtroom.

Notably, the Supreme Court has never adopted the triviality exception. In *Presley*, it held that the trial court had violated the defendant's Sixth Amendment public-trial right by excluding only *one* person from a *half-day* voir dire: the defendant's uncle, who was the "lone courtroom observer." 558 U.S. at 210. The triviality exception cannot encompass our case because, if it did, then it would encompass *Presley*. *Id.*; *see also*, *e.g.*, *United States v. Negrón-Sostre*, 790 F.3d 295, 300 (1st Cir. 2015) (one-day voir dire closure).

On balance, the district court made a critical error in reaching for the triviality exception to deny Aguiar's habeas claim. If that exception is to have any meaningful "outer boundaries," *see Gupta*, 699 F.3d at 685, the exception cannot apply to the highly and uniquely serious voir-dire closures at issue here.

C. The court erred in holding that counsel's failure to challenge the voir-dire closures could not have been deficient under *Strickland*.

The district court held that, because "closures at issue were too trivial to amount to Sixth Amendment violations," Aguiar's trial and appellate counsel could not have been ineffective for failing to challenging them. A1463. To the contrary, their failure to

challenge the voir-dire closures fell below an objective standard of reasonableness.

1. Trial Counsel

It could not have been sound trial strategy for Aguiar's trial counsel not to object to the voir-dire closures. *See Owens*, 483 F.3d at 64 ("[W]e do not see how the failure to object to the closure could have been sound trial strategy."). In fact, in its opposition to Aguiar's habeas motion, the government made no allegation that Aguiar's trial counsel strategically chose not to object. A1385.

By the 2005 trial, it was blackletter law that a voir-dire closure violates a defendant's Sixth Amendment public-trial right. That rule was so "well settled" that the Supreme Court in *Presley* summarily reversed the lower court's contrary conclusion, grounding its summary disposition in the 1984 decisions of *Waller* and *Press-Enterprise*. *See Presley*, 558 U.S. 209, 213 (2010) ("[I]t is so well settled that the Sixth Amendment right extends to jury voir dire that this Court may proceed by summary disposition."). Summary reversal is an "extraordinary," "rare," and "exceptional" disposition, which the Supreme Court employs only when "the law is well settled and stable." Shapiro et al., *Supreme Court Practice* 351 (10th ed. 2013). The lower court's decision must not only be clearly in error, but it should involve "an error of greater magnitude than the mere technical, harmless, or parochial error." *Id.* at 352. When the summary reversal is of a state court decision, as in *Presley*, such action is a "rarity" that must be "very clearly justified," given federalism and the deference owed to the state tribunal. *Id.* at 353–54 & n.115. In addition, as early as 1987 in *Cable News*, 824 F.2d at 1048, this Court was

"persuaded" that the unlawfulness of a partial voir-dire closure was "so clear" that "summary reversal [was] appropriate."

It was objectively deficient for Aguiar's trial counsel not to have invoked these well-settled authorities and objected to the trial judge's clear errors. *See United States v. Abney*, 812 F.3d 1079, 1092 (D.C. Cir. 2016) ("[T]here are no strategic considerations here to excuse [defense] counsel's failure to act on a reasonably probable interpretation of a statute that could benefit his client."); *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997) (holding that, because this Court issued a relevant decision "a year and a half earlier," defense counsel "should have been aware of the decision and its implications for his client"). Especially so because these particular voir-dire closures were so severe. For almost one week, the trial judge held court in a private backroom, concealed from concerned citizens, while flouting all four *Presley-Waller* factors. And trial counsel's acquiescence to such serious closures yielded serious consequences. The sworn affidavits of Aguiar, his mother, and his sister show that all three desired that the courtroom remain open for jury selection so that Aguiar's mother and sister could support him with their physical presence. A1329 ¶ 2; A1331 ¶ 7; A1333 ¶ 7. Moreover, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *See In re Oliver*, 333 U.S. 257, 270 n.25 (1948) (quoting 1 Thomas M. Cooley, *Constitutional Limitations* 647 (8th ed. 1927)).

2. *Appellate Counsel*

It could not have been sound strategy for Aguiar's appellate counsel (who was not Aguiar's trial counsel) not to raise a public-trial claim for plain-error review. That claim was stronger than any raised claim. *See Payne v. Stansberry*, 760 F.3d 10, 13–14 (D.C. Cir. 2014) (affirming appellate counsel's *Strickland* deficiency by comparing foregone claims with raised claims). Counsel raised four issues concerning Aguiar: the admittance of other-crimes evidence; the exclusion of extrinsic evidence; the objections sustained during closing arguments; his sentences' consecutive nature. *United States v. Burwell*, 642 F.3d 1062, 1066-68 (D.C. Cir. 2011). This Court denied the first claim with ease: "The district court did not abuse its discretion in admitting other acts evidence" because it "gave numerous and careful limiting instructions, which [cured] any potential prejudice." *Id.* at 1068. This Court dispatched the other claims in one sentence: "We have fully considered the rest of Appellants' arguments and find them to be without merit." *Id.* at 1071. Even under plain-error review—*see infra* ARGUMENT § I.D.2—the public-trial issue had far more promise than the issues that counsel did present.

D. The court erred in holding that counsel's failure to challenge the voir-dire closures could not have been prejudicial under *Strickland*.

The district court held that Aguiar had not shown that he was "prejudiced by his trial and appellate counsel's failure to object to either of the[] courtroom closures incidents." A1463 n.27. To the contrary, their failure to object prejudiced him.

1. Trial Counsel

In *Weaver v. Massachusetts*, 137 S. Ct. 1911 (2017), the Supreme Court held that, if trial counsel fails to object to a voir-dire closure, a habeas petitioner may satisfy *Strickland*'s prejudice prong by showing that "the particular public-trial violation was so serious as to render the trial fundamentally unfair." *Id.* at 1913. The Court determined that the voir-dire closure in *Weaver* could not surmount that threshold. But that voir-dire closure was typical: The two-day voir dire was conducted in a closed courtroom, not in a "secret" or "remote place"; the "closure decision apparently was made by court officers rather than the judge"; and "there were many members of the venire who did not become jurors but who did observe the proceedings." *Id.*

Here, however, the particular voir-dire closures were serious enough to render the proceedings fundamentally unfair. After conducting the entirety of general voir dire in a closed courtroom, the trial judge chose to hold the entirety of individual voir dire in a backroom. Unlike the voir-dire closure in *Weaver*, 137 S. Ct. at 1913, which court officers implemented and which spanned only two days, the judge here presided over closed voir-dire proceedings for almost one week—818 transcript pages worth. For that entire period, Aguiar's mother and sister were unable to support Aguiar, even though they had promised to. A1329 ¶ 2; A1331 ¶ 7; A1333 ¶ 7. And because only one prospective juror at a time was permitted inside the backroom, prospective jurors were unable to observe their peers' examinations, unlike in *Weaver*, 137 S. Ct. at 1913.

What is more, the backroom was, in fact, a "remote place." *Weaver*, 137 S. Ct. at

1913. The entrance to the backroom was behind the judge's bench in the ceremonial courtroom. A314:1-2; A1455. The only persons permitted inside, besides the judge, were the defendants, their attorneys, the prosecutors, court officers, and one-at-a-time, a prospective juror. A1460–61. The judge not only conducted individual voir dire there, but it also presided over pretrial arguments between the defendants' attorneys and the prosecutors over evidentiary issues. *See* STATEMENT OF CASE § II.B (citing examples from record). Such secretive judicial conduct is antithetical to the bedrock principles underlying the Sixth Amendment right to a public trial. As early as 1565, Sir Thomas Smith had affirmed that, although the "the indictment [is] put in writing: "All the rest is doone openlie." Thomas Smith, *De Republica Anglorum* 101 (Alston ed. 1972). By the late-eighteenth century, Sir Edward Coke had confirmed that because "courts" were, by definition, "open," court proceedings should not be administered in "chambers, or other private places." Edward Coke, *The Second Part of the Institutes of the Laws of England* 103 (Brooke 5th ed. 1797). "The presumptive openness of the jury selection process in England … carried over into proceedings in colonial America," and was woven into the tapestry of the Sixth Amendment guarantee. *Press-Enterprise*, 464 U.S at 508. And yet, in 2005, the trial judge did precisely what Coke warned against in 1797: It administered court proceedings from inside a chamber.

Indeed, administering proceedings from the "remote" backroom was far more "serious" than administering proceedings from a closed courtroom would have been. *See Weaver*, 137 S. Ct. at 1913. The conduct here was an order of magnitude worse—

enough to render Aguiar's trial "fundamentally unfair," *see id.*, because the conduct flouted two separate, institutional protections that are critical for a fair voir dire, and thereby a fair jury and a fair trial: not only (i) the proceeding's publicity, but also (ii) the courtroom's formality.

As the Supreme Court has repeatedly held, publicity makes judges and attorneys more likely to heed standard procedures, and makes prospective jurors more likely to be forthcoming about their biases. In the open, aware of the public's presence, voir-dire participants behave more dutifully, more honestly. Publicity thus promotes a fair voir dire, which makes possible a fair jury and a fair trial. *E.g.*, *Press-Enterprise*, 464 U.S. at 508 ("[T]he sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known."); 3 Wigmore § 1834 (1st ed. 1904) ("[U]nder the public gaze," "judge, jury, and counsel" are "more strongly moved to a strict conscientiousness in the performance of duty.").

But the Supreme Court has further held that, like a courtroom's openness, a courtroom's formality also makes judges, attorneys, and prospective jurors more attuned to their responsibilities. The courtroom's trappings—the nation's flag, the court's seal, the judge's raised bench—are not trifles. Those solemn symbols impress upon the courtroom's inhabitants the grave importance of their roles. As Justice Warren observed, "the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to the integrity of the trial process." *Estes v. Tex.*, 381 U.S. 532, 561 (1965) (Warren, J., concurring) (citation

and punctuation omitted); *accord, e.g.*, *Deck v. Missouri,* 544 U.S. 622, 631 (2005) ("The courtroom's formal dignity" reflects the "gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.").

So, by holding court in a remote backroom for nearly one week, the trial judge snuffed out both (i) the public's and (ii) the courtroom's power to ensure a fair voir dire, and thereby a fair jury and a fair trial. Relative to a closed courtroom, in that remote backroom, the process was even less likely to yield a fair jury. The ensuing trial, therefore, was inevitably and fundamentally "unfair," thus prejudicing Aguiar under the standard set forth in *Weaver*, 137 S. Ct. at 1913.

2. Appellate Counsel

A habeas petitioner may satisfy *Strickland*'s prejudice prong by showing that "an objectively reasonable [appellate] attorney would have sought plain error review because the issue had a reasonable likelihood of success." *Payne*, 760 F.3d at 14. "Under the plain error standard of review, there must be (1) error (2) that is obvious, (3) affects substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 14 (citation and punctuation omitted).

Here, an objectively reasonable appellate attorney would have sought plain-error review of the trial judge's voir-dire closures. The summary reversals in *Presley* and in *Cable News* demonstrate that the voir-dire closures were obvious errors. *See supra* ARGUMENT § II.C.1. The errors affected Aguiar's substantial rights, and seriously affected the fairness, integrity, and public reputation of the proceedings, for the same

reasons that they rendered the trial fundamentally unfair. *See supra* ARGUMENT § II.D.1.

* * *

On this record, the district court erred in denying Aguiar's ineffective-assistance claim under 28 U.S.C. § 2255(b). And on this record, this Court should reverse the district court's judgment, hold that Aguiar's trial and counsel were ineffective in failing to challenge the closures, and vacate Aguiar's conviction and sentence.

Alternatively, if further evidence is needed to resolve this claim, this Court should vacate the district court's judgment and remand for further proceedings, including an evidentiary hearing. That relief is warranted if Aguiar has raised a colorable *Strickland* claim concerning *either* trial counsel's *or* appellate counsel's ineffectiveness; he need only make one showing, not both, to earn a hearing. *See Payne*, 760 F.3d at 14 (holding that petitioner had a colorable *Strickland* claim regarding appellate counsel's ineffectiveness and remanding for further proceedings); *United States v. Eshetu*, 863 F.3d 946, 957 (D.C. Cir. 2017) ("On this record, we do not know *why* defense counsel declined to pursue [a particular argument]. The trial record does not conclusively show the defendants' entitlement *vel non* to relief and we therefore must remand.").

II. This merits panel should expand the COA to encompass Aguiar's habeas claim that his trial counsel was ineffective for failing to explain the sentencing consequences of rejecting the plea.

On July 5, 2016, this Court's special panel granted Aguiar a COA on one issue, but denied him a COA on "the remaining issues," including whether his counsel was ineffective in failing to explain the sentencing consequences, under 18 U.S.C. § 924(c), of rejecting the government's plea offer. *See* Order (Dkt. 1623013) (July 5, 2016). On October 12, 2016, Aguiar's appointed counsel filed a motion for the special panel to reconsider that part of its July 5, 2016, Order denying a COA on the plea-bargain issue. *See* Mot. (Dkt. 1640688) (Oct. 12, 2016); Reply (Dkt. 1646198) (Nov. 15, 2016). Counsel filed the motion under Federal Rule of Appellate Procedure 27. The special panel referred the motion to this merits panel and directed the parties to address, in their appellate briefs, "the appropriate vehicle for seeking reconsideration of" the special panel's COA denial. *See* Order (Dkt. 1660327) (Feb. 9, 2017).[8]

A. This merits panel may expand the COA to encompass the plea-bargain issue, based on the authority that the special panel delegated to it.

Aguiar properly sought reconsideration of the special panel's COA denial by filing a motion, under Federal Rule of Appellate Procedure 27, addressed to that same

[8] On June 23, 2016 a different panel of this Court authorized Aguiar to file a second-or-successive habeas motion. *See infra* INTRODUCTION. That habeas motion, which is pending the district court, challenges the constitutionality of his 18 U.S.C. § 924(c) sentences. *Id.* The motion is being held in abeyance pending the Supreme Court's decision in *Sessions v. Dimaya*, No. 15-1498. *Id.* Appointed counsel will promptly notify the Court if the district court takes any action on the motion that would raise a mootness concern here.

panel. This Court's Handbook states, in the section describing Rule 27 motion practice: "If a party disagrees with the special panel's disposition of a motion, it may move for reconsideration by the same panel … ." *D.C. Cir. Handbook of Practice & Internal Procedures* (Jan. 26, 2017) ("Handbook") at 31. And Rule 27 states: "An application for an order or other relief is made by motion unless these rules prescribe another form."

Although the government will contend otherwise, *see* Gov't Resp. (1645050) (D.C. Cir. Nov. 8, 2016), and although three months passed between the COA denial and Aguiar's Rule 27 motion, the motion was timely. *First*, neither the Federal Rules, nor the Local Rules, nor this Court's Handbook specifies a deadline for a Rule 27 motion for reconsideration. Although some circuits have specified deadlines for Rule 27 motions for reconsideration, this Court has not. *See, e.g.*, 11th Cir. R. 22-1(c) ("The denial of a certificate of appealability, whether by a single circuit judge or by a panel, may be the subject of a motion for reconsideration but may not be the subject of a petition for panel rehearing or a petition for rehearing en banc."); 11th Cir. R. 27-2 ("A motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order."). *Second*, because there was no time limitation, the special panel retained the discretion to revisit its initial, interlocutory ruling. The three-month gap in no way interfered with this Court's business. *Third*, the three-month gap caused the government no prejudice. In fact, when it opposed the motion, the government made no allegation that the gap had prejudiced it. *See* Gov't Resp. (Dkt. 1645050) (Nov. 8, 2016). *Fourth*, the gap's explanation is reasonable. In the fall of 2016, while Aguiar's

appointed counsel was working on the appeal, counsel recognized that the plea-bargain issue had constitutional merit. Counsel then filed the motion. Overall, there would have been no sound reason for the special panel to have barred Aguiar's Rule 27 motion on the ground of timeliness.

Because Aguiar properly sought reconsideration of the special panel's COA denial via the vehicle of a Rule 27 motion, it would have been appropriate for the special panel to have considered Aguiar's Rule 27 motion and granted it—provided that Aguiar had satisfied the *Slack* standard for a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that a COA is warranted if "reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong"). As explained below, Aguiar has satisfied this standard. This merits panel may now properly exercise the authority, which the special panel delegated to it, to certify the plea-bargain issue.

B. This merits panel has the inherent authority to expand the COA to encompass the plea-bargain issue.

This merits panel also has the *inherent* authority to expand a COA to encompass an uncertified issue. *First*, on-point circuit decisions and local circuit rules illustrate a consensus that a merits panel may expand a COA to reach an issue on which the district court and the motions panel have declined to grant a COA. This Court should join the circuit consensus. *See, e.g.*, *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045–46 (7th Cir. 2001) (expanding COA to encompass briefed but uncertified issue, despite government's argument that expansion would "waste time and resources," because

"where the importance of an issue does not become clear until later in an appellate proceeding, this court has the authority to consider that issue, even though it is not included in the initial certificate"); *accord United States v. Shipp*, 589 F.3d 1084, 1087 (10th Cir. 2009) ("[C]ircuit courts … have recognized that they possess the authority to expand the COA to cover uncertified, underlying constitutional claims asserted by an appellant."); *Malone v. Sherman*, 412 F. App'x 803, 808 n.2 (6th Cir. 2011) ("A hearing panel [i.e., a merits panel] may sua sponte expand a COA even where, as here, a single-member of the Court has previously declined to do so."); *Phelps v. Alameda*, 366 F.3d 722, 727 (9th Cir. 2004) ("We do have the power to expand the scope of a COA to include additional issues, even if they previously had been deemed inappropriate for review."); *Villot v. Varner*, 373 F.3d 327, 337 n.13 (3d Cir. 2004) ("[T]he merits panel may expand the scope of the COA beyond the scope announced by the motions panel."); *United States v. Morgan*, 244 F.3d 674, 675 (8th Cir. 2001) (recognizing merits panel's "right" to "exercise its discretion to consider sua sponte issues beyond those specified in a certificate of appealability"); *see also* 9th Cir. R. 22-e (permitting petitioner to address "uncertified issues" in its merits brief under a separate heading, which is "construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate"); 4th Cir. R. 22(a)(1)(B) (permitting petitioner to brief uncertified issue, which the merits panel will "look at" and use to "determine whether the appellant has made the [*Slack*] showing"); 3d Cir. R. 22.1(b) ("[T]he merits panel may expand the certificate of appealability as required in the circumstances of a

particular case.").

Second, as this Court has "several times observed": A merit panel's "[f]ull consideration of an appeal … may bring to light facets of a case that were not brought out before a motions panel." *Wood v. Several Unknown Metro. Police Officers*, 835 F.2d 340, 343 n.6 (D.C. Cir. 1987). A motions panel does not have the benefit of a complete record, full briefing, or oral argument. *See id.* With those advantages, the merits panel may discern reasons for granting a COA that the motions panel missed. *See id.*

Third, for the merits panel to recognize its inherent power to revisit a special panel's decision is particularly warranted here. It is axiomatic that a special panel's decision on a "threshold," "jurisdictional" issue—that is, a decision on "the court's authority to adjudicate a controversy"—does not bind the merits panel. *See, e.g.*, *Ass'n of Inv. Brokers v. S.E.C.*, 676 F.2d 857, 863 & n.17 (D.C. Cir. 1982); *accord Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 32 (D.C. Cir. 1990) (holding that a motion panel's jurisdictional ruling, "made without benefit of a full display of the procedural situation in this case," was subject to "reexamination upon full briefing and argument before the merits panel") (citation and punctuation omitted); *ASARCO, Inc. v. F.E.R.C.*, 777 F.2d 764, 773 n.6 (D.C. Cir. 1985) ("The disposition of a motions panel may of course be reexamined during the merits panel's in-depth consideration of the case."); *Hayes v. U.S. Gov't Printing Office*, 684 F.2d 137, 138 n.1 (D.C. Cir. 1982) ("[A] merits panel is not bound by a motions panel's denial of a preliminary motion to dismiss for lack of jurisdiction"; "we are free to consider anew the issue … ."). Here, the decision on

whether to grant or deny a COA is itself a "threshold," "jurisdictional" inquiry. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

* * *

There is thus no procedural obstacle to this Court expanding the COA to encompass the plea-bargain issue. Furthermore, the following merits discussion—that the district court erred in holding that Aguiar's counsel was not ineffective in failing to advise him on the sentencing consequences of rejecting the government's plea offer, *see infra* ARGUMENT § III—will function to satisfy the *Slack* standard for a COA.

III. The district court erred in holding, on this record, that Aguiar's trial counsel could not have been ineffective for failing to explain the § 924(c) sentencing consequences of rejecting the government's plea offer.

As noted, this Court reviews *de novo* the district court's denial of an ineffective-assistance claim. *See supra* ARGUMENT § I (describing standard of review) (citing *United States v. Abney*, 812 F.3d 1079, 1087 (D.C. Cir. 2016)).

A. The court erred in holding that the failure of Aguiar's counsel to explain the sentencing consequences of rejecting the plea could not have been deficient under *Strickland*.

From the prosecution's outset, the government's central theory was that Aguiar had robbed four banks with firearms. The government filed a superseding indictment on August 5, 2004, which alleged that Aguiar and co-defendants had "armed themselves with assault weapons and pistols" to rob the banks, "confronting tellers, demanding money at gunpoint, and leaving with [cash]." A70–71. But the indictment charged no 18 U.S.C. § 924(c) violations. A67. That statute prohibits using a firearm in relation to a violent federal crime. 18 U.S.C. § 924(c)(1)(A). One count carries a ten-year mandatory minimum term, consecutive to any other term, if the firearm is a semiautomatic weapon. *Id.* § 924(c)(1)(B)(i). A second count carries a twenty-five year mandatory minimum term, consecutive to any other term. *Id.* § 924(c)(1)(C)(i).

The government extended a plea offer to Aguiar on September 17, 2004. A1446–47. It required him to plead guilty to one § 924(c) count. *Id.* Aguiar did not accept the offer; it expired on September 27, 2004 *Id.* On November 9, 2004, the government filed a second superseding indictment, which added several charges, including two § 924(c)

charges. A76–109. Under that indictment, Aguiar's mandatory sentencing exposure increased by twenty-five years, on the second § 924(c) count alone. A1314-16.

Aguiar has sworn—and it is undisputed at this point—that, while the plea offer was pending, his counsel never advised him that, if he rejected it, the government would respond by filing a superseding indictment with additional charges, including two § 924(c) charges; and that the second § 924(c) count would expose Aguiar to an additional twenty-five mandatory years. A1329 ¶ 1. Accepting this testimony on its face, the district court denied Aguiar's claim that his counsel was ineffective. It held that a defense attorney is not deficient for "failing to explain" the "sentencing implications of violations" that the government has not yet "actually charged." A1450–52. From that premise, the court concluded that Aguiar's counsel could not have been deficient for failing to explain the sentencing implications of two § 924(c) counts, which the government had not yet charged "at the time that the plea offer was extended and expired without acceptance." *Id.* The court derived that conclusion without conducting an evidentiary hearing. Under its analysis, no hearing was necessary. A1443.

But the court's analysis is fundamentally flawed. The government's theory of the case was that Aguiar had robbed *four banks* with *firearms*. In light of that central allegation, the government could have charged multiple § 924(c) counts from the prosecution's inception. Although the government included no § 924(c) counts in its first two indictments, competent counsel would have known that, if the case proceeded to trial, such counts would be on their way. Indeed, the government included one

§ 924(c) count in the plea offer itself, even though it had not yet indicted Aguiar or any co-defendant on that offense. At that point, with the plea offer, the government had made § 924(c) a concrete factor in the case.

Even absent the plea offer, competent counsel would have known that § 924(c) was in play. From 2004 to present, the government has routinely stacked § 924(c) counts as a prosecutorial strategy in plea bargaining. *See* Jaime Fellner, Human Rights Watch, *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, 2014 WL 4745530 (Apr. 1, 2014) ("Prosecutors will threaten to pursue these additional penalties unless the defendant pleads guilty—and they make good on those threats."); John Ashcroft, U.S. Dep't of Justice, *Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's Charging & Plea Policies*, 2003 WL 23475482 (Sept. 22, 2003) (directing prosecutors to charge § 924(c) enhancements "in all appropriate cases"); U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), at chp. 12, p. 359 (urging Congress to eliminate the "excessively severe and unjust" practice);[9] *Mandatory Minimums & Unintended Consequences: Hearing on H.R. 2934, H.R. 834, & H.R. 1466 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 35 (July 14, 2009), at p. 35 (testimony of Judge Julie E. Carnes on behalf of the Judicial Conference

[9] https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf

of the United States) (urging Congress to eliminate the "draconian" practice).[10]

Against that factual backdrop, the logical, material consequence of rejecting the plea offer would have been clear to competent counsel: The government would respond by filing a superseding indictment with additional charges, including two § 924(c) charges; the second § 924(c) charge would expose Aguiar to an additional twenty-five mandatory years. It is irrelevant that the government had not yet "actually charged" Aguiar with those two § 924(c) counts "at the time that the plea offer was extended and expired without acceptance." A1450–52. The risk was obvious because: (i) Aguiar's alleged criminal conduct was amenable to multiple § 924(c) charges; (ii) the government included one yet-uncharged § 924(c) count in the plea offer. With those two facts in mind, along with a basic awareness of the government's routine plea-bargaining practice, Aguiar's counsel needed only elementary reasoning to know what would happen if Aguiar rejected the plea offer. *See* Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Defense Representation* § 6.3(a) (2006) ("Counsel should inform the client of … the potential consequences of the agreement.");[11] *United States v. Booze*, 293 F.3d 516, 518 (D.C. Cir. 2002) (remanding to develop claim that counsel's "misadvising [the defendant] of the consequences of rejecting the plea offer deprived him of his right to effective assistance of counsel"); *United States v. White*, 257 F. App'x.

[10] http://judiciary.house.gov/_files/hearings/printers/111th/111-48_51013.pdf

[11] http://www.nlada.org/defender-standards/performance-guidelines/black-letter

382, 384 (2d Cir. 2007) ("[T]rial counsel's conduct arising from his failure to advise [the defendant] concerning the sentencing consequences of two § 924(c) convictions constituted ineffective assistance.").

The Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), is instructive. There, the Court held that competent counsel must advise the defendant on the deportation consequence of entering a guilty plea. *Id.* at 369. The Court reasoned that counsel's failure to inform Padilla of this consequence was deficient because it was "clear," "easily determined," and "severe." *Id.* at 365–69. If counsel is deficient for failing to explain a plea's *collateral*, *non-criminal-law* consequences, then by logical extension, counsel also must be deficient for failing to explain a plea rejection's *direct*, *criminal-law* consequences—particularly when one such consequence is exposure to a twenty-five-year mandatory minimum sentence.

The trial judge's January 31, 2005, hearing transcript does not salvage the district court's erroneous analysis. The transcript serves only to support Aguiar's allegation that he did not understand, and that his counsel failed to explain, the § 924(c) sentencing consequences of rejecting the government's plea offer—which is ironic, because the judge conducted the hearing to stave off appellate and habeas arguments that might arise from the defendants' plea-offer rejections. A157:3-21.

To be sure, at that hearing, the prosecutor correctly stated that the "major difference[]" between accepting the plea offer and proceeding to trial was "whether or not there are one or more than one conviction under 924(c)." A177:21–178:2. But the

prosecutor rendered that statement incomprehensible by adding: "But frankly, Your Honor, adding, all it really does to the calculation is add back in the three additional level that he otherwise would get for acceptance of responsibility." A178:3-6.

The prosecutor's suggestion—that, post-*Booker*, forfeiting the three-level reduction for accepting responsibility was the only sentencing consequence of proceeding to trial rather than accepting the plea offer—is flatly incorrect. By rejecting the plea offer and proceeding trial, Aguiar was exposing himself to something much more severe, sentencing-wise, than a three-point guideline calculation loss. No one—neither Aguiar's counsel, nor the government, nor the judge—said anything at the hearing to warn Aguiar that, if he rejected the plea offer and proceeded to trial, he would expose himself to two § 924(c) counts and thus an additional twenty-five mandatory years. A174:22–A179:14.

B. The court erred in holding that the failure of Aguiar's counsel to explain the sentencing consequences of rejecting the plea could not have been prejudicial under *Strickland*.

Under *Lafler v. Cooper*, 566 U.S. 156, 168 (2012), a defendant may establish *Strickland* prejudice by showing that the "loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." Here, after the plea offer expired, Aguiar went to trial and was convicted under an indictment that contained the same three charges in the plea offer, plus an additional six charges: one additional 18 U.S.C. § 924(c) count; two additional counts in violation of 18 U.S.C. § 922(g)(1); two counts in violation of 18 U.S.C. §§ 2113(a) & (d)

and 2; and one count in violation of 18 U.S.C. § 371. A1319–20. Aguiar was sentenced to sixty years imprisonment: thirty-five years on the two § 924(c) counts—ten years for the first, plus twenty-five years for the second—which ran consecutively to twenty-five years on the remaining counts. A1314-16. The second § 924(c) count alone accounted for 42% of his sentence.

The risk of this mandatory twenty-five year imprisonment term would have incentivized any reasonable defendant in Aguiar's position to accept the plea offer. *See Lafler*, 566 U.S. at 167–68 ("The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel."). Aguiar has sworn—and it is undisputed—that he would have accepted the plea offer, had counsel advised him properly. A1329 ¶ 1. Aguiar need not show anything more, at this juncture, to expose the error in the district court's holding that Aguiar could not have suffered *Strickland* prejudice.

* * *

On this record, the district court erred in denying Aguiar's ineffective-assistance claim under 28 U.S.C. § 2255(b). This Court should vacate the district court's judgment and remand for further proceedings, including an evidentiary hearing. *See United States v. Rashad*, 331 F.3d 908, 912 (D.C. Cir. 2003) ("[W]e cannot say with the requisite certainty, based upon the record now before us, that Rashad was aware of his sentencing exposure when he decided to go to trial").

CONCLUSION

First, on whether Aguiar's counsel was ineffective for failing to challenge the voir-dire closures, this Court should reverse the district court's denial of Aguiar's habeas claim, hold that Aguiar's counsel was ineffective, and vacate Aguiar's conviction and sentence. Alternatively, this Court should vacate the district court's denial of Aguiar's habeas claim and remand for further proceedings consistent with its opinion, including an evidentiary hearing.

Second, this Court should grant Aguiar a COA on whether his counsel was ineffective for failing to explain the sentencing consequences of rejecting the plea.

Third, on whether Aguiar's counsel was ineffective for failing to explain the sentencing consequences of rejecting the plea, this Court should vacate the district court's denial of Aguiar's habeas claim and remand for further proceedings consistent with its opinion, including an evidentiary hearing.

Dated: August 18, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

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I certify that on August 18, 2017, I filed the Brief and Appendix, with the Clerk of the Court electronically via the CM/ECF system. I certify that I will hand deliver copies of the Brief and Appendix, to the Clerk of the Court. I certify that the following attorneys are registered CM/ECF participants for whom service will be accomplished electronically via the CM/ECF system on August 18, 2017, and by Federal Express:

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