ORAL ARGUMENT SCHEDULED FOR FEBRUARY 8, 2018

No. 15-3027

United States Court of Appeals

for the District of Columbia Circuit

Carlos Aguiar,

Plaintiff–Appellant,

v.

United States of America,

Defendant–Appellee.

On Appeal from the United States District Court for the District of Columbia (No. 1:04-cr-355-CKK-3) (Kollar-Kotelly, J.)

APPELLANT'S REPLY BRIEF

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INTRODUCTION & SUMMARY OF ARGUMENT

The government urges this Court to affirm the summary dismissal of Aguiar's claim that trial and appellate counsel were ineffective in not objecting to the court's decision to conduct private individual voir dire for nearly one week. The government principally argues that the courtroom closure was too "trivial" to constitute a predicate violation of Aguiar's right to a public trial. By asking this Court to declare this closure "trivial," the government is asking the Court to remove the jury-selection phase of the criminal trial from the ambit of the public-trial guarantee altogether. But by the time Aguiar's jury was selected, the Supreme Court had firmly placed the jury-selection phase within that ambit.

The government also urges this Court to deny a certificate of appealability (COA) or to affirm the summary dismissal of Aguiar's claim that his trial counsel was ineffective in not advising him on the sentencing risks that attended rejecting the plea offer. As the government notes, our opening brief does not account for the fact that Aguiar's plea agreement required him to plead guilty to one 18 U.S.C. § 924(c) count for the use of a *machinegun*, which carried a thirty-year mandatory minimum sentence. But taking that fact into account does not change the outcome here. As the government notes, the plea offer exposed Aguiar to a sentence of forty-seven to fifty-one years. When he rejected the plea offer, the government responded by filing an indictment with *two* 18 U.S.C. § 924(c) charges for the use of a machinegun, which exposed him to a mandatory life sentence. It was only by the fortuity of the jury's grace that Aguiar was

convicted on those charges for using a semiautomatic weapon rather than a machinegun; but even then, his actual sentence was sixty years imprisonment. Aguiar has sworn—and there is nothing in the record to the contrary—that his counsel failed to warn him that the government would respond to his rejection of the plea offer with an indictment that carried greater sentencing exposure because of § 924(c) stacking. Therefore, the district court should not have summarily dismissed this claim, and this Court should grant the COA and remand on it.

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 closure.

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

The government argues that Aguiar's ineffective-assistance claim fails because there was no predicate violation of his right to a public trial. *See* Gov't Br. 26–32. Yet twenty-one years before Aguiar's trial, the Supreme Court established that courtroom closures in criminal cases are unconstitutional unless the trial court *first*:

1) identifies "an overriding interest that is likely to be prejudiced" without closure;

2) ensures the closure is "no broader than necessary to protect that interest";

3) "consider[s] reasonable alternatives to closing the proceeding"; and

4) "make[s] findings adequate to support the closure."

Waller v. Georgia, 467 U.S. 39, 48 (1984); *accord Presley v. Georgia*, 558 U.S. 209, 213 (2010) (observing that this rule was so "well settled" after *Waller* that the Court summarily reversed the Georgia court's rejecting defendant's right to open voir dire).

In implementing the complete voir-dire closure here, the trial judge did not apply this test at all, a fact the government does not dispute. Therefore, the voir-dire closure violated Aguiar's right to a public trial. *See* Op'g Br. 29–30.

The government counters that the trial judge could have used a husher to conduct individual voir dire in an open courtroom. Conducting individual voir dire in the jury room is essentially the same thing, and because the former practice is undoubtedly constitutional, the latter practice is constitutional, too—so the argument goes. *See* Gov't Br. 32, 39. But if individual voir dire is conducted with a husher in an open courtroom, the public can physically observe that a formal legal proceeding is occurring, and the participants' (the judge, attorneys, and venirepersons) knowledge of the public's physical presence can ensure that the participants dutifully conduct themselves. That scenario, where a husher is used as needed in a public setting, is qualitatively different from, and not remotely comparable to, what happened here. *See Gillars v. United States*, 182 F.2d 962, 977–78 (D.C. Cir. 1950) ("The fact that all of the public were not immediately within the hearing of this testimony did not transform the trial into a nonpublic one."). From the afternoon of April 5 through the afternoon of April 11, the judge conducted the entire individual voir dire from a site that was even more remote than a closed courtroom: the private jury room behind the courtroom—

a room designed to ensure the *secrecy* of the jury's private deliberation. For nearly one week, the judge held court proceedings from inside the private jury room, administering individual voir dire and presiding over several evidentiary arguments.

To be sure, there might be sound reasons for conducting some parts of an individual voir dire in private, and that decision might not violate the public-trial right. But the purpose of the *Waller* test is for the judge to limit that process and to articulate reasons for that decision, on the record, so that those reasons can be scrutinized. That critical, constitutional process did not happen here. Rather, the trial was closed as a matter of convenience—and that reason is not good enough. *See* Op'g Br. 29.

The government is also wrong to claim that the voir-dire closure here was not unconstitutional because it did not violate certain values underpinning *Waller*. *See* Gov't Br. 31–32. In *Waller*, the Court observed that trials should be public to ensure that "judge and prosecutor carry out their duties responsibly," to "encourage[] witnesses to come forward," and to "discourage[] perjury." 467 U.S. at 46. That line describes a rationale behind the Sixth Amendment right to a public trial, but it does not describe the manner in which this right is protected. Rather, in determining whether the closure at issue violated the defendant's right to a public trial, the *Waller* Court conducted a particular four-part inquiry: "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Id. at 48 (citing *Press-Enterprise Co. v. Super. Crt. of Cali.*, 464 U.S. 501, 510 (1984)). Where, as here, a court utterly fails to perform that before-the-fact, four-part inquiry, the ensuing complete closure is unconstitutional as a matter of law.

B. The voir-dire closure was not trivial.

The government argues that the trial judge here need not have applied the *Waller* test because the voir-dire closure was too "trivial" to violate Aguiar's Sixth Amendment right to a public trial. *See* Gov't Br. 30–31. A trivial closure is so insignificant as to be "no error at all." *United States v. Perry*, 479 F.3d 885, 889 (D.C. Cir. 2007) ("We need not decide the correct standard of review" because a trivial closure is "no error at all."). But, as we explained in our opening brief (at 30–31), for nearly one week, the trial judge here held court proceedings from inside the private jury room, administering individual voir dire and presiding over several evidentiary arguments. In no sense may that sort of closure be "trifling; inconsiderable; of small worth or importance." *See Black's Law Dictionary* (10th ed. 2014) (defining "trivial").

Nor can the length of the trial's evidentiary phase render the jury-selection closure here "trivial." *See* Gov't Br. 30. Indeed, if this jury-selection closure is trivial, then every jury-selection closure is trivial, including the half-day closure in *Presley*. But if every jury-selection closure is trivial, then the Sixth Amendment right to a public jury selection would cease to meaningfully exist. So, the government's argument falters because it proves too much. The triviality exception, as the government applies it, would swallow the public-jury-selection guarantee.

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

The government argues that counsel's failure to challenge the voir-dire closure was not deficient under *Strickland* because it was the district court's "common practice" to conduct individual voir dire in the private jury room for cases involving multiple co-defendants and large jury pools. *See* Gov't Br. 28 (citing A1461 n.16). But if a "common" practice is unconstitutional under well-settled Supreme Court law, then counsel is responsible for recognizing, and objecting to, a "common" constitutional violation. *See United States v. Negron-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015) (disparaging a court's "'longstanding practice' of excluding the public from jury selection" because it "comes at great cost" and holding, on plain error review, that the defendant's Sixth Amendment rights were violated by the exclusion); *Jones v. United States*, 224 F.3d 1251, 1258 (11th Cir. 2000) ("Once the Supreme Court ruled … the situation became completely different. There was no need for speculation or clairvoyance. … The law was then clear … .").

At the time of Aguiar's trial, it had been well settled that the district court's practice was unconstitutional. As the Supreme Court stated in *Presley*, two "clear precedents"—*Waller* and *Press-Enterprise*, which the Court had decided in 1984, twenty-one years before Aguiar's trial in 2005—had "well settled" that closing voir dire violates the Sixth Amendment right to a public trial. 558 U.S. at 213. The precedents of *Waller* and *Press-Enterprise* had spoken with such clarity on the unconstitutionality of closing

voir dire that the *Presley* Court summarily disposed of the case. *Id.* at 213 ("[I]t is so well settled that the Sixth Amendment right extends to jury voir dire that this Court may proceed by summary disposition."). As we explained in our opening brief (at 32), a summary disposition is "exceptional" and used only when "the law is well settled and stable." Shapiro et al., *Supreme Court Practice* 351 (10th ed. 2013). Although the district court altered its practice after *Presley* was decided, *see* A1461 n.16, *Presley* shows that the district court should have altered its practice much earlier—after *Waller* and *Press-Enterprises* had been decided in 1984.

And if not by 1984, then the district court should have altered its practice by 1987, when this Court issued its opinion in *Cable News*. *See* Op'g Br. 28. There, this Court was "persuaded" that the unlawfulness of a partial voir-dire closure was "so clear" that "summary reversal [was] appropriate." *Cable News Network v. United States*, 824 F.2d 1046, 1048 (D.C. Cir. 1987). This Court stated without qualification: "Voir dire proceedings shall henceforth proceed in accordance with this opinion." *Id.* at 1049.

The government urges that *Cable News* is inapposite because this Court based its holding on the public's First Amendment right to an open voir dire, rather than the defendant's Sixth Amendment right to an open voir dire. *See* Gov't Br. 29. Yet *Waller* illustrates the overlap between the First Amendment and Sixth Amendment right to open voir dire: "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." 467 U.S. at 46. For that reason, in enumerating the four

factors that courts must consider before closing the courtroom to remain within constitutional bounds, *Waller* (a Sixth Amendment case) relied on *Press-Enterprise* (a First Amendment case). *Id.* at 45 ("We stated the applicable rules in *Press–Enterprise*."); *accord Presley*, 558 U.S. at 213 (recognizing that *Waller* relied heavily on *Press-Enterprise* and observing that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has.").

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

1. The government "does not concede" that Aguiar can satisfy *Strickland* prejudice by any method other than ordinary, but-for *Strickland* prejudice—that is, by showing a reasonable probability that the result in his trial would be different but for the voir-dire closure. *See* Gov't Br. 36 n.16. But in *Weaver*, the Supreme Court assumed that *Strickland* prejudice for an unconstitutional voir-dire closure may be demonstrated either in the ordinary way *or* by "a demonstration of fundamental unfairness"—that is, a demonstration that "the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911, 1913 (2017); *id.* at 1916–17 (Breyer, J., joined by Kagan, J., dissenting) ("agree[ing]" with the majority "that a showing of fundamental unfairness is sufficient to satisfy *Strickland*" for voir-dire closures).

Indeed, after finding that the petitioner in *Weaver* could not satisfy ordinary, but-for *Strickland* prejudice, the *Weaver* Court proceeded to ask "the remaining question" of "whether petitioner has shown that counsel's failure to object rendered the trial fundamentally unfair," and proceeded to conclude that the "petitioner has not made the showing." *Id.* at 1913.

2. *Weaver*'s fundamental-fairness inquiry for a voir-dire closure necessarily focuses on the closure's severity. In an ordinary case on direct review, a voir-dire closure will entitle the defendant to "automatic reversal." *Weaver*, 137 S. Ct. at 1905. In an ordinary case on collateral review, a defendant challenging the voir-dire closure will lose. So, Weaver lost. Presley would have lost, too, were that case on collateral review, because the judge there excluded only one person from a half-day voir dire: the defendant's uncle, who was the "lone courtroom observer." *Presley*, 558 U.S. at 210.

But in an extraordinary case like this one, where the entire jury is selected in a closed setting, the analysis is different. If the closure is for a nearly week-long individual voir dire, the constitutional violation is extreme, and it does not matter whether the trial attorney has objected. The defendant will win, even on collateral review. *Weaver*, 137 S. Ct. at 1913 (observing that *Strickland* prejudice can be shown by a "demonstration of fundamental unfairness"). And although the *Weaver* Court noted the "strong evidence" against Weaver in its background description of the case, the Court did not factor in the evidence's strength when assessing whether the voir-dire closure was serious enough to render the proceeding fundamentally unfair. *Id.* at 1906, 1913.

3. Therefore, the "remaining question"—to borrow *Weaver*'s language—is whether "the particular public-trial violation" here "was so serious as to render [Aguiar's] trial fundamentally unfair." *Id.* It was. The trial judge held court—including individual voir dire and pre-trial litigation—in the remote jury room for nearly one week. Although in *Weaver*, "many members of the venire who did not become jurors … did observe the proceedings," 137 S. Ct. at 1913, not so here. *See* Op'g Br. 35–38.

4. The government notes four mitigating factors to undermine the closure's seriousness. First, the government notes that, because the record is public, the closure is less problematic. But the right to a public record is independent of the right to a public trial. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). And because a transcript cannot "recapture the atmosphere" of voir dire, a record is not an effective tool for the public to check judicial abuse. *See Gomez v. United States*, 490 U.S. 858, 875 (1989). At bottom, it is important to retain the public's ability to evaluate the trial in real time. *In re Oliver*, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to *contemporaneous review* in the forum of public opinion is an effective restraint on possible abuse of judicial power.") (emphasis added).

Second, the government notes that Aguiar's closure was not serious because none of the "potential harms flowing from a courtroom closure"—such as venireperson perjury or party misconduct—"came to pass." *See* Gov't Br. 37 (quoting

Weaver, 137 S. Ct. at 1913). The *absence* of demonstrable harm flowing from a courtroom closure should be given little weight when determining the closure's seriousness. Neither this Court nor the Supreme Court has ever found that a courtroom closure produced demonstrable harm or required such proof. Nor should a closure require such proof. Because the benefits and harms of public voir dire are "frequently intangible, difficult to prove, or a matter of chance," a defendant can almost never pinpoint harm resulting from closure. *Waller*, 467 U.S. at 50 n.9.

Third, the government notes that the backroom proceedings occurred in the presence of all parties to the case. *See* Gov't Br. 21, 37, 38–39. But this fact does nothing to ameliorate the unconstitutionality of closing off public access, because neither the parties nor their lawyers are members of the public for Sixth Amendment purposes.

Fourth, and finally, the government notes that no attorney objected to the closure. *See* Gov't Br. 22, 37, 39. But Aguiar's very claim is that his attorney performed ineffectively under *Strickland* by not objecting.

E. The court erred in holding that appellate counsel's failure to challenge the voir-dire closure was not ineffective assistance of counsel.

The government states that Aguiar "did not press his current claim of ineffective assistance of *appellate* counsel," making his claim a new one that this Court should not entertain. *See* Gov't Br. 39 n.17. As a *pro se* litigant, Aguiar's pleadings must be "liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations and punctuation omitted). Aguiar mentioned ineffective assistance of appellate counsel twice in the

memorandum he filed with his habeas motion and implied that what he claimed regarding trial counsel applied to appellate counsel, too. A1336–37 (providing law stating that analysis of appellate counsel's ineffective assistance mirrors analysis for trial counsel's); A1339 (noting "appellate ineffectiveness as detailed in the claims presented in this petition"). The district court understood that "Aguiar's motion is premised on ineffective assistance of counsel claims related to his … appellate counsel … [for] failing to object to certain portions of voir dire taking place in the jury room … ." A1440. When opposing Aguiar's habeas motion, the government itself correctly acknowledged that Aguiar "claims that … his appellate counsel … rendered ineffective assistance of counsel … ." A1374. Aguiar's claim to ineffective appellate counsel is not new.

Alternatively, the government argues that Aguiar's voir-dire closure was not plain error because such closures were common practice in trial courts and because the closure was trivial. *See* Gov't Br. 39 n.17. But as we have developed in related contexts here, *supra* ARGUMENT § I.A–B, and in the opening brief (at 26–31), Supreme Court precedent makes clear that a nearly week-long closure is a non-trivial and unconstitutional violation of Aguiar's right to a public trial. *See also United States v. Negron-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015) (disparaging a court's "'longstanding practice' of excluding the public from jury selection" and holding, on plain error review, that the defendant's Sixth Amendment rights were violated by the exclusion).

II. This Court should expand the COA because 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.

The government does not challenge the panel's authority to expand a COA, but it argues that this Court should not exercise that authority here. *See* Gov't Br. 40. According to the government, Aguiar's *Strickland* prejudice argument is based on a miscalculation of the plea offer's sentencing exposure, and in any event, Aguiar was aware of the risk he ran by rejecting the plea offer. *See* Gov't Br. 51. The government has the correct calculation, but using that calculation, Aguiar has shown *Strickland* prejudice: He would have accepted the plea to avoid risking a mandatory life sentence, and the "loss of the plea opportunity" led to the imposition of "a more severe sentence." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

A. The failure of Aguiar's counsel to explain the sentencing consequences of rejecting the plea constituted deficient performance under *Strickland*.

The government agrees that, if Aguiar has a viable *Strickland* prejudice claim, this Court should remand the case to the district court for an evidentiary hearing. *See* Gov't Br. 56 n.21. Still, the government observes that there is a dearth of authority for the proposition that counsel is deficient under *Strickland*'s performance prong for failing to explain the sentencing consequences of rejecting a plea offer. *See* Gov't Br. 56 n.21. True. But this observation ignores that there is no authority for the *contrary* proposition that counsel is *not* deficient for doing so. The district court cited no authority for its

holding, and the government has not unearthed any, either. Indeed, the lack of authority simply underscores the obviousness of the point: Competent criminal defense should be expected to advise the client on the sentencing consequences of rejecting a plea offer—even as to charges that the government has not yet brought. Anticipating stacked charges does not require a crystal ball. Aguiar's counsel should have explained the risk that stacking posed.

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*.

Aguiar has sworn that, had he known the sentencing consequences of rejecting the plea offer—that is, that the government would bring two stacked 18 U.S.C. § 924(c) charges that would increase his sentencing exposure—he would have accepted the plea offer. A1329 ¶ 1. That claim is substantial. *First*, although the plea offer exposed him to a sentence of forty-seven to fifty-one years imprisonment (as the government has calculated), rejecting the plea offer and proceeding to trial exposed Aguiar to a greater risk: mandatory life in prison based on two stacked 18 U.S.C. § 924(c) charges for using a machine gun. *See* 18 U.S.C. § 924(c)(1)(C)(ii). *Second*, although Aguiar avoided the mandatory life sentence, his actual sentence, which included stacked § 924(c) counts, was still significantly more severe: sixty years imprisonment.

1. *Aguiar can show* Strickland *prejudice because the plea agreement's sentencing exposure was less than the sentencing exposure of the indictment under which he went to trial.*

Under *Lafler*, to show *Strickland* prejudice "[i]n the context of pleas," "a defendant must show the outcome of the plea process would have been different with competent advice." 566 U.S. at 163. As the government has calculated, the plea offer exposed Aguiar to a sentence of forty-seven to fifty-one years imprisonment. *See* Gov't Br. 54–55. And as the government correctly notes, our opening brief does not account for the fact that the plea offer required Aguiar to plead guilty to one 18 U.S.C. § 924(c) count for *using* a *machinegun*, which carried a thirty-year mandatory minimum sentence. *See* 18 U.S.C. § 924(c)(1)(B)(ii); A1421 (stating that the "firearms charge under 18 U.S.C. § 924(c) carries a mandatory minimum term of thirty (30) years imprisonment").

But accounting for this fact only strengthens Aguiar's claim. Although we understated the plea offer's sentencing exposure—saying that one § 924(c) count exposed him to a ten-year mandatory minimum sentence—we also understated the risk that Aguiar ran by proceeding to trial, which we described as an additional twenty-five-year mandatory minimum sentence. After Aguiar rejected the plea offer, the government brought him to trial on two § 924(c) charges for *using a machinegun*, which carried a mandatory life sentence. *See* 18 U.S.C. § 924(c)(1)(C)(ii) ("In the case of a second or subsequent conviction under this subsection, the person shall … if the firearm involved is a machinegun … be sentenced to imprisonment for life."); A127 (Feb. 15, 2005, Indictment, Count IV) (charging Aguiar with 18 U.S.C. § 924(c)(1)(B)(ii),

and stating that Aguiar "knowingly used, brandished, carried and possessed a firearm, that is, a machinegun, during and in relation to and in furtherance of a crime of violence"); A134 (Feb. 15, 2005, Indictment, Count XI) (charging Aguiar *again* with 18 U.S.C. § 924(c)(1)(B)(ii), and stating that Aguiar "knowingly used, brandished, carried and possessed a firearm, that is, a machinegun, during and in relation to and in furtherance of a crime of violence").

It was only by the fortuity of the jury's grace that Aguiar ended up being convicted on two § 924(c) counts for using a semiautomatic weapon, carrying a mandatory minimum of thirty-five years (ten years for the first plus twenty-five years for the second)—rather than on two § 924(c) counts for using a machinegun, which would have carried a mandatory minimum life imprisonment term. Based on the "plain language of the indictment," A1467, *the risk* that Aguiar ran by rejecting the plea offer and proceeding to trial was substantial: a forty-seven to fifty-one-year prison term versus a mandatory life imprisonment term. Aguiar should have been carefully counseled on the risks that stacking posed before he decided whether to go to trial; that is what he claims did not happen. The trial court erred in concluding that he was not denied effective assistance on that basis.

2. *Aguiar can also show* Strickland *prejudice because the plea agreement's sentencing exposure was less than the actual sentence imposed.*

Although Aguiar was not subject to a mandatory life sentence after trial, he was prejudiced because the sentence he received after trial was substantially higher than the

sentence he would have received under the plea offer. *See Lafler*, 566 U.S. at 168 (holding that a defendant may establish *Strickland* prejudice by showing that the "loss of the plea opportunity led to a trial … the imposition of a more severe sentence").

As noted, the government calculates that the plea offer exposed Aguiar to a sentence of forty-seven to fifty-one years imprisonment. *See* Gov't Br. 51–52. 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. A1319–20.

So, Aguiar has properly pleaded that, had he been properly advised, he would have accepted the plea offer. The loss of his plea opportunity resulted in a more severe sentence. *Lafler*, 566 U.S. at 168.

C. There is nothing in the record showing that Aguiar was on notice of the sentencing risks of rejecting the plea offer and proceeding to trial.

The government argues that Aguiar was on notice of the risk of stacked charges. *See* Gov't Br. 51–52. Two hearings are at issue. *First*, the September 27, 2004, hearing, could not have put Aguiar on notice of the sentencing risk of rejecting the plea offer. There, the prosecutor stated that—unless the defendants accepted the plea offers that day—the offers would expire, and the government would file indictments with "other charges" relating to the six bank robberies. *See* Gov't Br. 51 (citing Tr. 11). But that statement could not have put Aguiar on notice that the government would respond to Aguiar's rejection of the plea offer by bringing *two* stacked § 924(c) machinegun charges,

exposing Aguiar to a mandatory term of life imprisonment. For Aguiar to make an informed decision, he needed to know about this mandatory life exposure.

Second, as we explained in our opening brief (at 50–51), the January 31, 2005, hearing not only failed to put Aguiar on notice, but could only have further confused Aguiar on the *mandatory life* risk of rejecting the plea offer. 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 to trial, Aguiar exposed himself to a mandatory minimum life sentence.

Finally, the government argues that Aguiar should have known about the risks of multiple 18 U.S.C. § 924(c) charges based on discussions between the court and Aguiar's *co-defendants* at the January 31, 2005, hearing. But the trial judge's and prosecutor's conversations about the risks of multiple 18 U.S.C. § 924(c) charges were *not* directed toward Aguiar. *See* A163 (conversation with co-defendant Palmer); A0173 (Burwell); A185 (Morrow). It would be nonsensical to impute Aguiar's co-defendants'

knowledge to Aguiar, especially where Aguiar's particular colloquy *contradicted* his co-defendants' colloquies.

CONCLUSION

As we concluded in our opening brief (at 53): *First*, on whether Aguiar's counsel was ineffective for failing to challenge the voir-dire closure, 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. In the alternative, 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 18 U.S.C. § 924(c) sentencing consequences of rejecting the plea.

Third, on whether Aguiar's counsel was ineffective for failing to explain the 18 U.S.C. § 924(c) sentencing consequences of rejecting the plea offer, 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: January 8, 2018

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 4,993 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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Dated: January 8, 2018

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CERTIFICATE OF SERVICE

I certify that on January 8, 2018, I filed the foregoing Reply Brief with the Clerk of the Court electronically via the CM/ECF system. I certify that I also will hand deliver paper copies to the Clerk of the Court after the ECF-filing is approved.

I certify that the below attorneys in this appeal are registered CM/ECF participants for whom service will be accomplished by the CM/ECF system electronically on January 8, 2018. I certify that I also will send paper copies to the below attorneys by Federal Express after the ECF-filing is approved.

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