ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3027

UNITED STATES OF AMERICA, Appellee,

v.

CARLOS AGUIAR, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. No. 04-cr-355 (CKK)

Certificate of Parties, Rulings, and Related Cases

Pursuant to D.C. Circuit Rule 28(a)(1), appellee hereby states as follows:

Parties and Amici

The parties to this appeal are appellant, Carlos Aguiar, and appellee, the United States of America. There are no amici.

Ruling Under Review

This is an appeal from the February 27, 2015, order and opinion by the Honorable Colleen Kollar-Kotelly, denying appellant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. That published order and opinion, which may be found at *United States v. Aguiar*, 81 F. Supp. 3d 77 (D.D.C. 2015), reaffirmed the district court's previous order and opinion of February 12, 2015, denying the motion, which may be found in the Joint Appendix at page 1437, as well as at *United States v. Aguiar*, 82 F. Supp. 3d 70 (D.D.C. 2015).

Related Cases

From April through June, 2005, appellant Aguiar stood trial along with five co-defendants in *United States v. Miguel Morrow*, *et al.*, district court case number 2004-cr-355 (CKK), in a case involving, inter alia, conspiracy and bank robbery charges. A jury convicted appellant Aguiar, along with all of his co-defendants, of multiple offenses, and this Court affirmed appellant's convictions on direct appeal. *United States v. Burwell*, 642 F.3d 1062 (D.C. Cir. 2011).[1] A seventh co-defendant from the original indictment, Guidel Olivares, appealed his sentence to this Court after he pleaded guilty to conspiracy to commit armed bank robbery. This Court affirmed, in *United States v. Olivares*, 473 F.3d 1224 (D.C. Cir. 2006).

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[1] Co-defendants in this consolidated trial and direct appeal included Bryan Burwell (Appeal No. 06-3070), Aaron Perkins (06-3071), Malvin Palmer (06-3073), appellant (06-3077), Miguel Morrow (06-3083), and Lionel Stoddard (06-3084). This Court subsequently vacated its 2011 *Burwell, et al.*, panel decision and granted en banc review on an issue unrelated to appellant Aguiar. Following en banc consideration, this Court reinstated the panel's opinion in full. *United States v. Burwell*, 600 F.3d 500, 516 (D.C. Cir. 2012).

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee states that all pertinent statutes and regulations are contained in the Addendum to the Brief for Appellant.

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Issues Presented

I. Whether appellant's trial counsel rendered constitutionally ineffective assistance by failing to object when appellant's mother and sister allegedly were excluded from the courtroom during general voir dire, and when the district court held individual voir dire and brief discussions of some evidentiary issues in the jury room, where: 1) counsel's performance was not deficient because any "closures" of the courtroom were trivial; and 2) appellant cannot demonstrate prejudice, as required by *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

II. Whether a motion for reconsideration filed with this Court is the appropriate mechanism for requesting reconsideration of a denial of a Certificate of Appealability by the district court.

III. Assuming the availability of appellate review, whether appellant's trial counsel rendered constitutionally ineffective assistance by allegedly failing to properly inform appellant about the possibility that appellant would face additional charges if he rejected the government's preindictment plea officer, where the trial record conclusively demonstrates that appellant was informed about that possibility but still rejected the plea offer, and hence could have suffered no prejudice.

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No. 15-3027

UNITED STATES OF AMERICA, Appellee,

v.

CARLOS AGUIAR, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a 20-count indictment filed on February 15, 2005, a grand jury charged appellant, Carlos Aguiar, together with his five co-defendants (Bryan Burwell, Aaron Perkins, Malvin Palmer, Miguel Morrow, and Lionel Stoddard), with a number of charges related to a series of armed

bank robberies (J.A. 110-42).[2] Appellant was specifically charged with racketeering ("RICO") conspiracy, in violation of 18 U.S.C. § 1962(d); armed-bank-robbery conspiracy, in violation of 18 U.S.C. § 371; two armed bank robberies, in violation of 18 U.S.C. § 2113(a); two counts of using a firearm (machinegun) during a federal crime of violence, in violation of 18 U.S.C. § 924(c); and three counts of unlawful possession of a firearm by a felon ("FIP"), in violation of 18 U.S.C. § 922(g)(1); and various weapons charges (J.A. 110). Appellant and his co-defendants stood trial by jury before the Honorable Colleen Kollar-Kotelly, from April 18 through June 21, 2005 (J.A. 17-38) (docket from district court case)). On July 15, 2005, the jury returned multiple guilty verdicts against all of the co-defendants (J.A. 43-44) (verdict form (D.E. 473)). Specifically, the jury convicted appellant of all charges, except that with respect to the two § 924(c) counts, the jury acquitted appellant of

[2] "J.A." refers to the joint appendix filed by appellant, and "S.A." to appellee's supplemental appendix filed with this brief. "D.E." refers to the docket entry in district court case No. 04-cr-355. "D." refers to the document number in the instant appeal. This procedural history section is taken in large part from the government's consolidated brief on direct appeal in this case, No. 06-3070, which resulted in this Court's decision in *United States v. Burwell*, 642 F.3d 1062 (D.C. Cir. 2011).

possessing fully automatic machine guns, but convicted him of possessing semiautomatic assault weapons (*id.*).

On May 4, 2006, Judge Kollar-Kotelly sentenced appellant to serve an aggregate term of 720 months of imprisonment, including consecutive mandatory terms of 120 months and 300 months for the two § 924(c) counts, and to pay $361,000 in restitution (J.A. 1319-22). Appellant took a direct appeal from his convictions and sentences, which this Court rejected in a published opinion, on April 29, 2011. *United States v. Burwell*, 642 F.3d 1062, 1065-68 (D.C. Cir. 2011).

On September 12, 2012, Aguiar filed a pro se motion to vacate his sentence pursuant to 28 U.S.C. § 2255, pressing multiple claims of ineffective assistance of trial counsel (J.A. 1323–64). The government responded on April 8, 2013 (J.A. 1365-1410). As directed by the district court, the government filed a supplemental brief on January 14, 2015 (*id.* at 1411, 1414). On February 12, 2015, the district court denied appellant's § 2255 motion in a published memorandum opinion (*id.* at 1437-80; *see also United States v. Aguiar*, 82 F. Supp. 3d 70 (D.D.C. 2015) ("*Aguiar (I)*"). The district court declined to issue a certificate of

appealability ("COA") from its February 12 order (J.A. 1481; *Aguiar (I)*, 82 F. Supp. 3d at 96).

Appellant filed a self-styled "Traverse to the Government's Answer" to appellant's original 2255 filing, which was docketed in the district court on February 25, 2015. *See United States v. Aguiar*, 81 F. Supp. 3d 77, 78 (D.D.C. 2015) ("*Aguiar (II)*"). The district court treated the "traverse" as a motion for reconsideration of its February 12 order (J.A. 1491). On February 27, 2015, the district court issued a second memorandum opinion in which it reaffirmed its order, and further addressed one of appellant's ineffectiveness claims (J.A. 1491; *see also Aguiar (II)*, 81 F. Supp. 3d 77, 77-82). Appellant timely noted an appeal to the district court's February 27, 2015, order on April 16, 2015 (J.A. 1501).

The same day -- April 16 -- appellant moved in this Court for a certificate of appealability (D. 1611304). On September 28, 2015, the government filed a motion to dismiss for lack of a COA (D. 1575255). Appellant responded on February 19, 2016 (D. 1600130).

On July 5, 2016, this Court ordered that a COA would issue as to one of appellant's ineffectiveness claims, and appointed current counsel

to represent appellant (D. 1623013). On October 12, 2016, appellant moved this Court to reconsider its July 5 ruling (D. 1640688). On November 8, 2016, the government contended that appellant's reconsideration motion was untimely (D. 1644662); appellant filed a reply on November 15, 2016 (D. 1646198). On February 9, 2017, this Court ordered the parties to

> address in their briefs, in addition to the issue identified in the court's July 5, 2016 order granting in part appellant's motion for a certificate of appealability: (1) the threshold issues discussed in their pleadings concerning the appropriate vehicle for obtaining review of the denial in part of appellant's motion for a certificate of appealability; and (2) the merits of appellant's claim that trial counsel was ineffective in failing to advise him properly concerning the sentencing consequences of rejecting the plea offer. (D. 1660327.)[3]

[3] On February 10, 2017, appellant moved to hold this appeal in abeyance pending the Supreme Court's decision in *Weaver v. Massachusetts* (D. 1660676). This Court granted appellant's request. Appellee subsequently moved to reopen this appeal following the decision in *Weaver* on June 22, 2017. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017); D. 1682841 (appellant's motion of July 6, 2017, to reopen appeal). This Court granted appellant's motion on July 18, 2017 (D. 1684765).

Appellant's Trial[4]

The Government's Evidence

In its direct-appeal decision, this Court described the government's evidence at appellant's trial as follows:

> The six [a]ppellants, along with co-conspirators-turned-government-witnesses Nourredine Chtaini and Omar Holmes, indulged in a violent crime spree throughout the District of Columbia metro area that lasted for nearly a year and a half. Appellants, who began by cultivating and selling marijuana, evolved into a ring that committed armed bank robberies, using stolen vehicles to travel to the targeted banks and make their escapes. By the summer of 2004, the robbers had developed a signature style. The gang wore bullet-proof vests, masks, and gloves, and relied on superior fire power, preferring to use military weapons like AK–47s instead of handguns because they surmised the metropolitan police "wouldn't respond" when [a]ppellants "robb[ed] banks with assault weapons." [transcript citation omitted].

Burwell, 642 F.3d at 1064-65.

Aguiar's co-defendant, Miguel Morrow, along with government witness Chtaini, were the crew's core members, participating in every crime, choosing most of the robbery targets (S.A. 103-04, 115-16, 130-31,

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[4] Because of the nature of this appeal, a full recounting of the trial facts, which involved evidence against five co-defendants in addition to appellant, is unnecessary here. A more fulsome recitation of the facts is available at pp. 5-54 of the government's brief in consolidated appeal no. 06-3070.

162-63, 176-78, 207-08), and controlling the crew's weapons, vehicles, and stash houses (*id.* at 229-31, 102, 134, 157-59, 215). Appellant joined the conspiracy because of his relationship with Chtaini, whom he had known since 1990 (*id.* at 099-100). By the fall of 2003, Chtaini and appellant were so close they were "like brothers" (*id.* at 101).

At trial, Chtaini personally implicated appellant in multiple crimes. Specifically, Chtaini testified that on January 21, 2004, appellant, Chtaini, and three other crew members lay in wait in a stolen van for an armored car Morrow had seen serve a Citibank in Northeast Washington, D.C. (S.A. 104-08). Appellant was wearing a camouflage bulletproof vest, a white bandana as a mask, and gloves, and carrying a handgun (*id.* at 107, 113); other crew members were also wearing bulletproof vests, and some were carrying assault weapons (*id.* at 107-08, 109, 217-18, 112). The armored car never appeared, however, and the group retired to one of the multiple apartments they used for their activities, where they spent the night (*id.* at 114-15).

The following day, on January 22, 2004, the crew robbed the Bank of America branch at 5911 Blair Road, Northwest (the "BOA" robbery) (S.A. 115-16, 034-35, 037, 045, 308). During the robbery, appellant wore

a mask, and performed "crowd control" by standing guard in the lobby while armed with an AR-15 assault rifle (*id.* at 116).[5] The crew stole roughly $140,000 from the bank and made good their escape, splitting the proceeds later that evening at an apartment in Maryland (*id.* at 129).

On May 10, 2004, the crew robbed the Chevy Chase Bank branch in Silver Hill, Maryland ("CCA" robbery) (S.A. 137, 051, 061, 058-60, 318). Appellant, this time carrying an AK-47 assault rifle, again performed "crowd control" (*id.* at 137-41).[6] Morrow, Chtaini, and appellant ran in, "yelling and screaming, 'Get the fuck down. Get the fuck down.'" (*id.* at 140, 051-52) While appellant was in the lobby "keeping everybody . . . in check" with the AK-47, Chtaini fired two shots near the

[5] The bank's surveillance video cameras captured the crew's movements both inside the bank and as they were leaving; multiple still photographs from that footage showed appellant, armed with the assault rifle, standing guard in the lobby during the robbery and while other crew members carried proceeds out of the bank (S.A. 120-28, 312-18)

[6] The crew had purchased a number of AK-47 assault rifles from an individual named Leonard Lockley, a member of the U.S. military who had smuggled the rifles back from Iraq (S.A. 135-36).

band manager's head, then began emptying teller drawers (*id*. at 142-43, 055-57).[7]

On their way out of the bank following the CCA robbery, the crew encountered Officer Katie Collins of the Prince George's County Police Department, who had pulled into the parking lot during the robbery (S.A. 152-53). The crew fled in a minivan with Officer Collins in pursuit (*id*. at 151). First Stoddard, then appellant and Chtaini, began shooting at Officer Collins's cruiser, breaking out the back window of the minivan (*id*. at 154-55). Officer Collins continued to pursue the crew despite taking fire, but ultimately lost them at an intersection (*id*. at 062-64). The police later found a shell casing beside the road along the crew's flight path that was consistent with having been fired by the AK-47 appellant was carrying during the CCA robbery (*id*. at 066-67, 068-72;

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[7] Again, the bank's surveillance cameras captured the crew's movements inside the bank. Still photographs from the footage showed appellant, Morrow, and Chtaini -- in that order -- entering the lobby while two customers "cowered" on the floor, and an old woman stood at a teller window "looking scared" (S.A. 144-45, 053-54). Another photograph showed appellant, wearing a white bandana as a mask and carrying the AK-47 performing crowd control in the lobby (*id*. at 146-48). Three other photographs showed appellant, then Chtaini, and lastly Morrow leaving the bank (*id*. at 148-51).

219-21). After swapping cars and burning the minivan, the crew drove to Morrow's family's home in Northeast Washington, D.C., and split the $50,000 stolen from the bank (*id*. 156-57).

Seventeen days later, on May 27, 2004, the crew robbed the Chevy Chase Bank branch in Hyattsville, Maryland ("CCB") (S.A. 160-64, 039-40; 319). Appellant, wearing a bulletproof vest, gloves, and a white bandana as a mask, again carried one of the AK-47s and provided "security outside of the bank," while Burwell performed crowd control, Chtaini emptied the teller drawers, and Morrow went "for the vault" (*id*. 165-66). Chtaini emptied the teller drawers, but the crew was unable to access the vault despite Burwell striking one of the bank workers twice in the back of the head with his rifle (*id*. at 041-43, 167-68). In addition to $18,000, the crew stole the bank's video cassette recorder, and fled in another minivan which they then burned (along with the VCR), before switching to a second car, which they then also burned before switching to a third car and driving to one of their apartments to split the proceeds (*id*. at 168-69, 171-72, 046-50, 320).

Sixteen days after the CCB robbery, the crew robbed the Industrial Bank on Rhode Island Avenue in Northeast Washington, D.C. (S.A. 175-

76, 182, 076-78).[8] Appellant again wore a white bandana as a mask, a bulletproof vest, and carried one of the crew's AK-47s (*id.* at 179-81, 133). Upon their arrival, the group encountered the bank security guard standing outside; they took the guard inside with them and appellant handcuffed the guard with the guard's own handcuffs (*id.* at 183-84, 188). Chtaini and Morrow emptied the teller drawers, and Chtaini found the bank manager (*id.* at 183-84, 188, 077, 079-80). After the bank manager told Chtaini she was unable to open the safe, Chtaini fired a shot at the safe's combination lock, but the round ricocheted off (*id.* at 185-87). The crew then fled, carrying $30,000 with them which they divided amongst themselves, again after abandoning and burning two more cars along their escape route (*id.* 193-97, 082-83, 084, 325-26).[9]

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[8] Over Memorial Day weekend 2004, in between the CCB robbery and the Industrial Bank robbery, five members of the crew, including appellant, traveled to Miami, Florida, together with "five young ladies," where they stayed in a luxury two-bedroom hotel suite and "partied" for three or four days, spending most, if not all, of the money from the CCB robbery on the suite, champagne, high-grade marijuana, and entertainment (S.A. 160, 172-75, 233-34).

[9] Stills from the bank's video surveillance again captured appellant's activities, showing him performing crowd control in the lobby, and pointing his rifle at the security guard (S.A. 189-90, 074-75, 078). Appellant could be seen in another photograph standing in the lobby, wearing his gray North Face jacket and a white bandana (*id.* at 188).

The police arrested Chtaini on July 11, 2004 (S.A. 198-205, 212-13). Chtaini started cooperating almost immediately, and by July 15, 2004, had admitted to all of the bank robberies and provided the names of his coconspirators to law enforcement without a plea offer (*id*. at 209-10). On August 3, 2004, the government filed the original indictment in this case, and the court issued bench warrants (J.A. 67). On August 4, 2004, appellant was arrested after a high-speed chase in which he rammed a police car while trying to escape (*id*. at 236-51). The police found a loaded handgun bearing appellant's fingerprints on the passenger-side floorboard of the car he was driving (*id*. at 251-54, 257-60).

Co-conspirator-turned-government witness Omar Holmes testified at trial that while the two were in a holding cell awaiting a court appearance early on in the case appellant told him that he had spent $10,000, but still had $15,000 left in proceeds from the robberies (5/23p: 5593).

Finally, the police recovered a white bandana with a blood stain on it during a search warrant of one of the crew's apartments (S.A. 086-87, 317). The bandana was in a gym bag underneath a bed; also in the gym bag was an AK-47 assault rifle and a camouflage bulletproof vest (*id*. at

088-91, 093-97, 316). The blood stain from the bandana contained appellant's DNA (*id*. at 223-27).

The Defense Evidence

Appellants put on experts who agreed with the conclusions reached by the government's DNA and ballistics experts (S.A. 262, 267-69).

The Direct Appeal

Appellant, along with his five co-defendants, filed a consolidated brief on direct appeal, pressing some seven claims, none of which challenged trial counsel's effectiveness, or any courtroom closure (D. 1209454 in Appeal No. 06-3070). This Court subsequently affirmed appellants' convictions and sentences. *Burwell*, 642 F.3d at 1065-68, 1071.

The § 2255 Litigation

On September 12, 2012, appellant filed a pro se motion to vacate his sentence, and accompanying memorandum of law, pursuant to 28 U.S.C. § 2255 (J.A. 1323–64). Aguiar contended that his counsel had rendered constitutionally ineffective assistance by, inter alia: (1) failing to explain the sentencing consequences of rejecting a plea offer and

proceeding to trial; and (2) failing to investigate and object to Aguiar's family members being excluded from the courtroom during jury selection, and failing to object to certain portions of voir dire taking place in the jury room (*id.*; *see also Aguiar (I)*, 82 F. Supp. 3d at 76).[10] Attached to appellant's pro se motion were affidavits from his mother and sister, who claimed that they attempted to attend voir dire at appellant's trial on April 5, 2005, but were not allowed to enter the courtroom by an unidentified court officer (J.A. 1331-34). Appellant's mother and sister further asserted that they returned three days later and were allowed to enter the courtroom (*id.*). Appellant also appended an affidavit in which he claimed that "during trial" he had informed his trial counsel about his family's exclusion from the courtroom, and asked counsel to investigate, and "speak to the judge about what occurred" (J.A. 1330).

On December 16, 2014, the district court requested supplemental briefing by the government regarding the facts underlying appellant's plea-offer claim (J.A. 1411). The government filed its supplemental brief as directed on January 14, 2015 (*id.* at 1414).

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[10] Appellant argued three other grounds for counsel's ineffectiveness, none of which he repeats on appeal. *See Aguiar (I)*, 82 F. Supp. 3d at 76.

On February 12, 2015, the district court denied appellant's § 2255 motion without a hearing in a published memorandum opinion (J.A. 1437-80; *see also Aguiar (I)*, 82 F. Supp. 3d 70). As germane here to appellant's plea-related ineffectiveness claim, the district court held that:

> [Appellant's] counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms by failing to explain to him the sentencing implications of violations to which he was not charged at the time that the plea offer was extended and expired without acceptance.

Id. at 80.

As to appellant's courtroom-closure claim, the district court made the following factual findings regarding voir dire in appellant's case:

> On Tuesday, April 5, 2005, the Court began jury selection in this matter. Jury selection was held in the ceremonial courtroom . . . because that was the largest courtroom in the courthouse with a seating capacity of approximately 230. While the Court has been unable to determine the exact number of potential jurors who were brought in for jury selection, the Court recalls that it was a large group given the publicity surrounding the case and the estimated length of the trial, which was 14 weeks. Tr. 56:7–10 (Apr. 5, 2005). The Court's estimate at the time of jury selection was that the trial would conclude around July 21, 2005, *id.* at 56:9, which was fairly close to the date that the jury actually returned its verdict, July 15, 2005.
>
> On the morning of April 5, 2005, the entire jury pool was brought into the ceremonial courtroom and the Court proceeded to read the 40–question voir dire to the jury pool.

From a review of the transcript, it appears that this lasted the majority of the morning. See Tr. 65:10–13 (Apr. 5, 2005) (indicating at the conclusion of the reading of the questions that the Court hoped to get one or two individual inquiries done prior to breaking for lunch). After the recitation of the voir dire questions, the Court broke the jury pool down into smaller groups and asked each group to return at staggered times so the Court and the parties could conduct individual discussions with the potential jurors about their responses to the questions. See *id.* at 59:21–61:13 (dividing the pool of jurors into groups and advising each group when to return). The Court then proceeded to individual voir dire which was conducted on the record with the defendants, their counsel, prosecutors, and the Court present in the jury room. It is unclear from the record when the decision to hold the individual voir dire in the jury room was made. At the last hearing prior to trial on March 23, 2005, the Court indicated: "I'm just trying to find a space big enough so with the cast of thousands we've got for the individual voir dire, we can do it efficiently but in a place that everybody's comfortable." Tr. 419:19–22 (Mar. 23, 2005). Nonetheless, while the individual voir dire was held in the jury room, peremptory challenges of jurors were conducted in the open courtroom. There are no objections on the record by any counsel to this process of jury selection.

Jury selection in this matter spanned from Tuesday, April 5, 2005, through the following Wednesday, April 12, 2005. After the Court read the questions to the jury, it immediately proceeded to the individual inquiries of each juror which started late in the morning of Tuesday, April 5, 2005, and continued until the afternoon of Monday, April 11, 2005, when 52 potential jurors had been identified. See Tr: 65:14–16 (Apr. 5, 2005); Tr. 983:20–24 (Apr. 11, 2005). On the afternoon on April 11, 2005 through April 12, 2005, the parties made peremptory challenges to the prospective jurors in courtroom 10.11 Opening arguments and the presentation of evidence commenced on Monday, April 18, 2005.

Id. at 82-83.

The district court "accept[ed] . . . as true" the statements in appellant's mother's and sister's affidavits that they were barred from entering the courtroom at the start of voir dire on April 5, 2005, as well as appellant's statement that he had informed his trial counsel about the courtroom closure. *Aguiar (I)*, 82 F. Supp. 3d at 83. As to how or why appellant's family was barred from the court, the district court found:

> Based on the record and this Court's own independent recollection of the events at issue, the Court avers that it never ordered that the courtroom be closed during any portion of jury selection or, for that matter, during any phase of trial. Nor did the Court, without issuing an order, instruct the United States Marshal['s]Service or any Courtroom Security Officer to exclude any member of the public from jury selection or the trial. Accordingly, the Court concludes for the purposes of this analysis that [appellant's] mother and sister were not permitted into the courtroom by a security officer who was not acting under the authority of the Court.

Id. at 84. The court noted that courtroom closures not authorized by a judge "still may raise Sixth Amendment concerns." *Id*. (citing *Owens v. United States*, 483 F.3d 48, 63 (1st Cir. 2007), and *Walton v. Briley*, 361 F. 3d 431, 433 (7th Cir. 2004)). However, the court held that the exclusion of appellant's family members from voir dire was "so trivial that it did not violate the Sixth Amendment," and therefore appellant's trial counsel

did not perform deficiently by failing to object to the closure. *Aguiar (I)*, 82 F. Supp. 3d at 84-85 (citing *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007) and *Peterson v. Williams*, 85 F. 3d 39, 42 (2d Cir. 1996)).

Regarding appellant's ineffectiveness claim related to the holding of individual voir dire in chambers, the district court held that "this closure also was trivial." *Aguiar (I)*, 82 F. Supp. 3d at 86. Finally, although the district court acknowledged a division of authority which existed at the time about whether a defendant alleging ineffective assistance of counsel for an improper courtroom closure must show prejudice, the court noted that appellant had not "alleged that he was prejudiced in any way by his counsel's failure to object to either of these courtroom closure incidents cited." *Id.* at 88, n.18 (citing cases on both sides).

On February 25, 2015, the district court received appellant's pro se, self-styled "Traverse to the Government's Answer" to appellant's original § 2255 filing (J.A. 1428).[11] Appellant's "traverse" dealt exclusively with

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[11] Although the district court clerk's office received appellant's "Traverse" on February 9, 2015, Judge Kollar-Kotelly did not receive the filing in chambers until February 25, 2015, because the clerk's office had

his plea-offer ineffectiveness claim, and alleged that his trial counsel had not properly communicated the government's plea-offer letter – which the government had filed as an exhibit to its supplemental brief on January 14, 2015 (J.A. 1414, 1428-34).

On February 27, 2015, the district court issued a second memorandum opinion in which it reaffirmed its holding of February 12, 2015, and further addressed appellant's additional claims of ineffectiveness regarding appellant's rejection of the plea offer (J.A. 1491; *see also Aguiar (II)*, 81 F. Supp. 3d 77). The district court treated appellant's "traverse" as a motion for reconsideration of its February 12, 2015, order (J.A. 1491).

In its February 27 opinion, the district court addressed the "narrow issues raised" therein, and otherwise reaffirmed its opinion of February 12, 2015. *Aguiar (II)*, 81 F. Supp. 3d at 77-78. Specifically, the district court held that, even "assuming arguendo . . . that [appellant's] trial counsel did not show him the plea letter . . . [appellant] cannot demonstrate that he was prejudiced in any way by these actions" because

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mistakenly forwarded the document to the U.S. Probation Office rather than the district court. *See Aguiar (II)*, 81 F. Supp. 3d at 78.

the parties discussed the terms of the plea in open court, and appellant indicated both that he understood the terms of the plea offer and was rejecting the offer. *Id.* at 79-80.

SUMMARY OF ARGUMENT

Appellant's courtroom-closure related ineffectiveness claim fails, because his trial counsel did not render deficient performance by failing to object to closures that were trivial in nature. Moreover, even assuming arguendo deficient performance by trial counsel, appellant has failed to demonstrate the he was prejudiced by the closures, as he is required to do. *See Weaver v. Massachusetts,* 137 S. Ct. 1899 (2017).

Although a merits panel of this Court has the authority to reconsider the motions panel's prior denial of appellant's motion for a certificate of appealability (COA) as to his plea-related ineffectiveness claim, it should not do so here, because appellant cannot show that reasonable jurists would find the district court's ruling "debatable or wrong," as required under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Even assuming the availability of appellate review, appellant's plea-related ineffectiveness claim fails, because the record demonstrates that

appellant cannot show that he was prejudiced by any act or omission by his trial counsel during plea negotiations.

ARGUMENT

I. Appellant's Trial Counsel Was Not Constitutionally Ineffective for Failing to Object to Any Courtroom Closures.

A. Additional Background

The district court's opinions of February 12 and 27, as described supra at 16-20, describe the conduct of the voir dire in this case. As noted by appellant (at 13-14), on two occasions during the individual voir dire process, the parties discussed other case-related matters. This background section describes those instances.

On the morning of April 6, 2005, while in the jury room, on the record with all parties, and during a break in the individual voir dire, the district court said the following:

> I think tomorrow morning we will have a period [of time where] the Court of Appeals will be in here and they must have this room. What I was going to suggest is that we be in Courtroom 10 and we talk about a couple [of] legal issues. We've got exhibits. There have been objections. We'll discuss that. The DNA one that you have filed. I would like to talk a little bit more about the opening statements. You will get my 404(b) [ruling] which is turning out to be very long. . . . So we can discuss if there's other particular things. (J.A. 556.)

Following this summary, the parties conducted pretrial discussions regarding: (1) DNA evidence and testing, and specifically the timing of certain defense testing (J.A. 556-58); (2) court vouchers for defense expert witnesses (*id.* at 558-59); and (3) the admissibility of certain expert testimony and evidence in preparation for the parties' opening statements (*id.* at 560-66). In reference to the next morning's session in courtroom 10, the district court said "I think we'll start at 9[:00 a.m.] because the group [of jurors] is coming in at 12:30 [p.m.]" (*id.* at 566). Neither appellant's counsel, nor any other defense attorney objected to these discussions.[12]

At the beginning of the afternoon session on April 8, 2005, which took place in the jury room but on the record, the parties discussed the issue of potential stipulations to certain evidence (J.A. 1000). Based on these discussions, co-defendant Morrow moved to sever his case from co-defendant Perkins (*id.* at 1002). The district court responded "[t]hat's

[12] It appears from the record that, on the morning of April 7, 2005, the district court likely held a session in open court on the record in another courtroom – "courtroom 10" – and then returned to individual voir dire in the jury room. Appellee has attempted unsuccessfully to locate the transcript for the April 7, 2005, morning session.

fine. You'll have to put it in writing" (*id.*). As to the stipulation discussions as a whole, the district court said:

> I [will] leave you to have a further discussion. I'm not going to get into – it's not the Court's role to decide whether you should have a stipulation or not, other than to make sure if you've done them, that they're done correctly and . . . in a timely manner. (*Id.* at 1004.)

The district court made clear that it was not making final decidions on issues during these in-chambers discussions, but rather attempting to "tee up" issues for future discussions by the parties either in open court, in written submissions, or both. See, e.g., J.A. 563-64 ("And I'm not making a ruling . . . [t]his is something you should talk about before we have a further discussion . . . "), 566 ("My suggestion before we have a further discussion is for you to sit down and have a discussion . . . "), 1002 ("you'll have to put [the severance motion] in writing"), 1004 ("it's not the Court's role to decide whether you should have a stipulation or not").

B. Applicable Legal Principles and Standard of Review

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). "Even under de novo review, the standard for judging counsel's representation is a most deferential one,"

Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 788 (2011), and "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). *Strickland* requires that the defendant prove (1) that counsel's performance was deficient, and (2) that counsel's "deficient performance prejudiced [his] defense." *Strickland*, 466 U.S. at 687. "Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* The Court need not examine the two components of an ineffective-assistance claim in any particular order. *Strickland*, 466 U.S. at 697. Indeed, the Court is not required "even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*

To establish deficient performance, the defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential," and "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. Moreover, "[a] fair assessment of attorney

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

"[I]neffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. More specifically, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "That requires a 'substantial,' not just a 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Richter*, 562 U.S. at 90 (2011)).

This Court reviews de novo denials of ineffective assistance claims. *United States v. Stubblefield*, 820 F.3d 445, 448 (D.C. Cir. 2016). The

district court's underlying factual findings are reviewed for clear error, however. *See, e.g., Payne v. Stansberry*, 760 F.3d 10, 13 (D.C. Cir. 2014).

C. Discussion

Appellant's courtroom-closure claim of ineffective assistance of trial counsel fails on both of *Strickland's* deficient performance and prejudice requirements.

1. Trial counsel's performance was not deficient.

Turning first to the exclusion of appellant's family members from general voir dire on April 5, 2005, appellant's trial counsel did not perform deficiently in failing to object to this procedure. As the district court explained:

> [The Court] never ordered that the courtroom be closed during any portion of jury selection or, for that matter, during any phase of trial. Nor did the Court, without issuing an order, instruct the United States Marshal Service or any Courtroom Security Officer to exclude any member of the public from jury selection or the trial. Accordingly, the Court concludes for the purposes of this analysis that [appellant's] mother and sister were not permitted into the courtroom by a security officer who was not acting under the authority of the Court.

Aguiar (I), 82 F. Supp. 3d at 84.

Because the district court did not order this courtroom closure either orally or in writing, there is no evidence that appellant's trial counsel knew that the closure was occurring. Moreover, although appellant's own affidavit states that he asked his counsel to investigate whether his family members were outside the courtroom, and further asked his counsel to raise the issue with the trial judge after talking with appellant's mother and sister, that same affidavit indicates that appellant told trial counsel about the problem "during trial," which would have been several days after the conclusion of voir dire (J.A. 1329-30). The record thus belies any claim that trial counsel knew of the alleged closure in time to make an objection. *See, e.g., United States v. Mack*, 841 F.3d 514, 525-26 (D.C. Cir. 2016) (describing "contemporaneous-objection rule"). Counsel cannot be ineffective for failing to take an action where he is unaware -- through no fault of his own -- of the factual basis for taking the action. *Cf. Ballinger v. Prelesnik*, 709 F.3d 558, 562-63 (6th Cir. 2013) (trial counsel not deficient for failing to call putative alibi

witness where counsel had no factual knowledge of the witness's existence).[13]

Nor did trial counsel render deficient performance by failing to object to the conduct of individual voir dire in the jury room. As the district court explained:

> Prior to the Supreme Court's ruling in *Presley v. Georgia*, 558 U.S. 209, 213 (2010), it was common practice in the [U.S. district court for D.C.] courthouse to conduct the individual voir dire of jurors in the jury room when a case involved multiple codefendants and there was a large jury pool[,] because it was less time consuming.

Aguiar (I), 82 F. Supp. 3d at 86, n.16.

This Court applies the "rule of contemporary assessment in evaluating claims of ineffective assistance of counsel." *United States v. Vyner*, 846 F.3d 1224, 1230 (D.C. Cir. 2017) (citations omitted). Thus, for example, *Presley*, decided five years *after* appellant's 2005 trial, is not controlling on the issue of deficient performance, even assuming

[13] Although *Strickland's* "deficient performance" requirement is not dispositive here (*see infra* discussion of *Weaver v. Massachusetts*), if this Court were to disagree, appellee would request a remand to the district court for further development of the record on the question of deficiency. In particular, although the district court assumed for the purposes of deciding the motion that appellant's and his family's statements were true, it seems doubtful that counsel actually failed to follow up on a request of this nature made by appellant.

arguendo *Presley* held that the courtroom closures at issue here were improper. Nor did this Court's decision in *Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987), establish that the district court's actions in this case were improper. Although *Cable News* briefly mentioned the defendant's Sixth Amendment right to a public trial, the precise issue in that case was an effort by news agencies to cover the voir dire proceedings. *See* 824 F.2d at 1047-48. Moreover, in *Cable News* the entire voir dire process, not just individual voir dire, was conducted in chambers. *Id.* at 1047. Thus, it was by no means clearly established that a district court could not – as in this case – bifurcate the voir dire process into general voir dire (conducted in the courtroom), and individual voir dire (conducted in a jury room). As this Court has recognized, it would be "unduly harsh to brand the bar incompetent for failing to grasp that which elude[d] the bench." *United States v. Hurt*, 527 F.3d 1347, 1356-57 (D.C. Cir. 2008). Thus, even assuming that *Cable News's* holding rendered the conduct of voir dire in this case questionable, that fact had "elude[d] the bench," in light of the pre-*Presley* "common practice" described by the district court here. *Aguiar (I)*, 82 F. Supp. 3d at 86, n.16.

Finally, trial counsel was not deficient for failing to object to the courtroom closures alleged in this case, because any such objection would not have been meritorious. *See, e.g., United States v. Watson*, 717 F.3d 196, 198 (D.C. Cir. 2013) (counsel "does not perform deficiently by declining to pursue a losing argument"). Both the "closures" at issue here were trivial in the context of this months-long trial, and therefore not violative of the Sixth Amendment at all.

In *United States v. Perry*, 479 F.3d 885 (D.C. Cir. 2007), this Court held that the exclusion of the defendant's 8-year-old son from the courtroom during the substantive presentation of the government's case did not violate the Sixth Amendment right to a public trial. *Id.* at 889. In *Perry*, this Court explained that "even a problematic courtroom closing can be 'too trivial to amount to a violation of the [Sixth] Amendment.'" *Perry*, 479 F.3d at 890 (quoting *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996)). This Court further explained that:

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant-whether otherwise innocent or guilty-of the protections conferred by the Sixth Amendment.

Perry, 479 F.3d at 890 (quoting *Peterson*, 85 F.3d at 42). A courtroom closing is "trivial" if it does not implicate the "values served by the Sixth Amendment" as set forth in *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984). *Id*. These *Waller* values include ensuring a fair trial and that the judge and prosecutor carry out their duties responsibly, discouraging perjury, and encouraging witnesses to come forward. *Perry*, 479 F.3d at 890 (citing *Waller)*.

None of the *Waller* concerns are implicated by the courtroom closures here. Appellant has not claimed that the judge or prosecutor committed any misconduct as a result of the procedures followed here. No plausible claim can be made that any witnesses would have been encouraged or discouraged from coming forward based on the partial closure of voir dire. There is likewise no claim that any juror committed perjury during the voir dire process. And, although appellant generally contends (during the course of asking this Court to excuse him from showing any prejudice) that the partial closures rendered his trial "unfair," those arguments lack specificity, and fail for the reasons discussed in Part I.C.2, infra at 33-39. Thus, the closures were trivial in nature, did not violate appellant's Sixth Amendment rights, and counsel

accordingly was not deficient for failing to object to them. *See, e.g.*, *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011) (voir dire in a closed jury room adjacent to the courtroom did not violate the Sixth Amendment guarantee to a public trial when there was no objection by trial counsel and the proceedings were on the record); *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir.2009) (courtroom closure during voir dire too trivial to vacate a conviction; significant portion of the afternoon session involved private interviews with individual jurors held in an adjacent room out of the hearing and sight of other jurors); *Copeland v. United States*, 111 A.3d 627, 633-34 (D.C. 2015) (questioning of individual jurors at bench with "husher" activated so members of the public could not hear the conversation does not violate the Sixth Amendment).[14]

[14] In Part I.C.2, infra, appellee addresses appellant's new allegation (at 13-14, 33, 36, 38) that the district court improperly conducted non-voir-dire court business in the jury room. As applied to deficient performance, and assuming arguendo appellate review, the district court's actions did not render its conduct of individual voir dire a non-trivial courtroom closure for the same reasons, explained in text infra, that appellant cannot show prejudice or unfairness at his trial.

2. Appellant fails to show prejudice, or any fundamental unfairness, in his trial.

This Court need not even reach the deficient-performance question, because appellant wholly fails to demonstrate any prejudice flowing from the courtroom closures. *See, e.g., United States v. Glover*, 872 F.3d 625, 630 (D.C. Cir. 2017) ("A court can deny an ineffectiveness claim on either the deficiency or prejudice prong") (citing *Strickland*).

In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the Supreme Court addressed the precise question of whether defendants must demonstrate *Strickland* prejudice in cases involving improper courtroom closures during voir dire, and answered the question in the affirmative.[15]

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[15] Prior to *Weaver*, the Supreme Court noted that:

> There [was] disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice in a case like this one—in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel. Some courts have held that, when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry. *See, e.g., Johnson v. Sherry*, 586 F.3d 439, 447 (C.A.6 2009); *Owens v. United States*, 483 F.3d 48, 64–65 (C.A.1 2007); *Littlejohn v. United States*, 73 A.3d 1034, 1043–1044 (D.C .2013); *State v. Lamere*, 327 Mont. 115, 125, 112 P.3d 1005, 1013 (2005). Other courts

Weaver involved the murder trial of a 16-year-old defendant. *Id*. at 1905. When Weaver's mother and the mother's minister attempted to attend the two days of voir dire at Weaver's trial, a court officer blocked their entry because the courtroom was not large enough to hold both the venire and members of the public. *Id*. at 1906. Weaver's mother informed his trial counsel of the courtroom closure, but the trial counsel believed the closure to be constitutional, and thus did not object. *Id*.

The Supreme Court presumed deficient performance by counsel for failing to object to an improper voir dire courtroom closure. *Weaver*, 137 S. Ct. at 1909 (citing *Presley,* 558 U.S. 209), 1912 ("the case comes on the assumption that petitioner has shown deficient performance by counsel"). The Court further recognized that "a violation of the right to a public trial is a structural error[,]" which may be implicated when voir-dire

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> have held that the defendant is entitled to relief only if he or she can show prejudice. *See, e.g., Purvis v. Crosby*, 451 F.3d 734, 738 (C.A.11 2006); *United States v. Gomez*, 705 F.3d 68, 79–80 (C.A.2 2013); *Reid v. State*, 286 Ga. 484, 487, 690 S.E.2d 177, 180–181 (2010).

Weaver, 137 S. Ct. at 1907. The *Weaver* Court "granted certiorari to resolve that disagreement," and did so "specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id*.

procedures are closed. *Weaver*, 137 S. Ct. at 1908. Nevertheless, the Court rejected Weaver's ineffectiveness claim, holding both that: (1) *Strickland* required that Weaver demonstrate prejudice from the courtroom closure; and (2) Weaver had failed to do so. *Id*. at 1911 ("when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice i*s not shown automatically*") (emphasis supplied), 1913 (finding no showing of prejudice).

Appellant's contrary contentions (at 34-38) aside, *Weaver* is dispositive on the issue of prejudice. Tellingly, appellant is completely silent on the issue of whether, had the district court conducted voir dire differently, there would have been a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Weaver*, 137 S. Ct. at 1911 (quoting *Strickland*, 466 U.S. at 694); *see also Richter*, 562 U.S. at 112 (reasonable probability standard requires that the "likelihood of a different result . . . be substantial, not just conceivable"). As in *Weaver*, appellant has pointed to no suggestion that "any juror lied during voir dire; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and

serious purpose that [the criminal justice] system demands." *Weaver*, 137 S. Ct. at 1913. Moreover, due to the nature of the government's trial evidence against appellant, which included detailed testimony of confederates, photos of appellant in the act of robbing banks, ballistics evidence, and DNA, it goes well beyond speculation to think that, had the district court conducted voir dire differently, the result of appellant's trial would have been different.

Similarly unavailing is appellant's claim (at 35) that he is entitled to reversal even in absence of a showing of *Strickland* prejudice, i.e., without regard to whether the result of his trial would have been different, because the district court's conduct of voir dire rendered his trial "fundamentally unfair." Even assuming arguendo, as the *Weaver* Court did, *see* 137 S. Ct. at 1911, that such an alternative formulation of *Strickland* prejudice is permissible,[16] as in *Weaver*, appellant's trial

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[16] Appellee does not concede that *Strickland* prejudice may ever be shown without a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Stated differently, there is no free-floating "fundamental fairness" standard, untethered from the "reasonable probability" standard. S*ee, e.g., Weaver*, 137 S. Ct. at 1914-15 (Alito, J., concurring) ("Counsel simply 'cannot be ineffective unless his mistakes have harmed the defense (or, at least, unless it is reasonable likely that they have.)'") (citing *United*

> was not conducted in secret or in a remote place . . . . [t]he closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the [initial] closure decision apparently was made by court officers rather than the judge . . . and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.

137 S. Ct. at 1913. Although appellant's family members were unable to attend the general voir dire session, they were able to attend every other aspect of the case, including literally months of the daily presentation of trial evidence in open court. While appellant makes much of the length of individual voir dire here, the district court conducted that individual voir dire: (1) on the record; (2) in the presence of all parties to the case; (3) without objection from any party; and (4) without any suggestion of misconduct by any juror or party. The individual voir dire was lengthy simply because of the size of the venire in this six-co-defendant trial. In short, in appellant's trial, as in *Weaver*, there was "no showing . . . that the potential harms flowing from a courtroom closure came to pass in this case." 137 S. Ct. at 1913.

States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (parenthesis in *Gonzalez-Lopez*)). *Weaver* does not hold to the contrary. 137 S. Ct. at 1911 ("In light of the Court's ultimate holding, however, the Court need not *decide that question here*[.]") (emphasis added).

Finally, in the district court, appellant did not press what he now suggests was an additional error by that court; namely, the conduct of evidentiary and other discussions during breaks in the voir dire in the jury room on April 6 and April 8, 2005 (Brief for Appellant at 13-14, 33, 36, and 38). Any claim of error by the district court in this regard is thus new on appeal, and not properly before this Court. S*ee, e.g, United States v. Naranjo*, 254 F.3d 311, 313 (D.C. Cir. 2001) ("By raising certain claims 'before the court which imposed sentence,' 28 U.S.C. § 2255, the Defendant has waived his statutory right under § 2255 to assert other claims on appeal as part of his initial motion for collateral review.")

Even if considered under the rubric of appellant's "fundamentally unfair" prejudice argument, these sessions do not require reversal. During the April 6 session, it is clear from the transcript that the district court was merely "setting up" or identifying issues with the parties for later discussions in open court, and the court repeatedly stressed that it was not making any rulings in chambers (J.A. 563-64, 566). The April 8 session simply concerned potential stipulations between the parties, something the district court properly recognized was "not the Court's role to decide" (J.A. 1004). Those discussions -- held on the record in the

presence of all parties, and without objection -- were indistinguishable from routine mid-trial bench conferences, and did not affect the fairness of appellant's trial. *See, e.g., United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) ("'the trial judge is not required to allow public . . . intrusion . . . [into] a bench interchange'") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S 555, 598 & n.23 (1980) (Brennan, J., concurring)).[17]

[17] In the district court, appellant did not press his current claim of ineffective assistance of *appellate* counsel for failing to raise the courtroom-closure issue (Appellant's Brief at 34, 38-39). That claim is therefore not properly before this Court. *See, e.g, Naranjo*, 254 F.3d at 313.

Even if this Court were to entertain the claim, however, appellant could not show ineffective assistance of his appellate counsel. As appellant concedes (at 34), even if appellate counsel had raised the issue, it would have been reviewed for, at most, plain error. The combination of the doctrine of contemporary assessment, *Vyner*, 846 F.3d at 1230, the common practice of the district court pre-2010, *Aguiar (I)* , 82 F. Supp. 3d at 86, n. 16, and this Court's "triviality" cases, *Perry*, 479 F.3d at 889, made any error in failing to press the courtroom closure issue far from "plain." *See, e.g., United States v. Olano*, 507 U.S. 725, 732 (1993). Moreover, trivial courtroom closures do not "affect substantial rights," because they do not amount to constitutional violations at all, *Perry*, 479 F.3d at 889, nor does the conduct of voir dire or evidentiary discussions at issue here affect the "fairness, integrity, or public reputation of judicial proceedings," *Olano*, 507 U.S. at 732, for all the same reasons set out in text infra.

II. This Court May, But Should Not, Reconsider the Motions Panel's COA Decision.

Upon further review, and in light of the procedural posture of this case, appellee agrees that Federal Rule of Appellate Procedure 27 was an appropriate vehicle for appellant to request reconsideration of the motions panel's partial denial of his application for a COA. Appellee further agrees that, because the motions panel referred appellant's COA motion to the merits panel in this case, the merits panel has express authority to reconsider the motions panel's COA decision. *Cf., e.g., United States v. Feuver*, 236 F.3d 725, 726-27 (D.C. Cir. 2001) (example of motions panel referring motion to merits panel for disposition). This Court accordingly need not reach, and appellee takes no position on, the question of whether, in the alternative, the merits panel has the inherent authority to *expand* the original COA.

Nevertheless, for the reasons set forth in Part III infra, appellee opposes the grant (or expansion) of a COA to cover the plea bargaining issue, because appellant has not satisfied the requirements for obtaining a COA in light of the record evidence. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (COA is warranted where "reasonable jurists would find

the district court's assessment of the constitutional claim[] debatable or wrong").

III. Even Assuming the Availability of Appellate Review, Appellant's Plea-Related Ineffectiveness Claim Fails.

A. Additional Background

By letter on September 17, 2004, the government extended appellant a preindictment plea offer to one count of RICO conspiracy, in violation of 18 U.S.C. § 1962(d), one count of the use of a fully automatic firearm (machinegun) in furtherance of a federal crime of violence, in violation of 18 U.S.C. § 924(c), and one count of possession of a firearm by a felon (FIP), in violation of 18 U.S.C. § 922(g) (J.A. 1420); *see also Aguiar (II)*, 81 F. Supp. 3d at 80-81 (describing plea letter). Under the heading of "Potential penalties, assessments, and restitution," the plea letter set out the following:

> Your client understands that the RICO charge . . . carries a maximum penalty of life imprisonment . . . [t]he firearms charge under 18 U.S.C. § 924(c) carries a mandatory minimum term of thirty (30) years imprisonment . . . which sentence cannot run concurrently . . . [and] [t]he firearms charge under 18 U.S.C. § 922(g) carries a maximum prison term of ten (10) years imprisonment . . ." (J.A. 1421.)

Under the heading "Additional charges," the letter explained:

> If your client fulfills all obligations under this plea agreement, this Office will not bring any other charges with respect to bank robbery, assault, and weapons offenses which are included as racketeering acts and/or otherwise described in the superseding [c]riminal information filed in this case and the subject of this plea agreement, and will not file additional 924 (c) violations. (JA 1421.)

Under the heading "Sentencing Guidelines," the letter indicated:

> Your client fully and completely understands that the final determination of how the United States Sentencing Guidelines apply to this case will be made solely by the Court. (J.A. 1424.)

The government's plea offer did not require appellant to enter a cooperation agreement, although it provided that the government would file a motion for an addition one-level decrease (in addition to two levels for his acceptance of responsibility) in appellant's applicable guidelines range if appellant assisted in the investigation and prosecution of the offenses (*id*. at 1423-24).

By its terms, the plea offer expired on September 27, 2004 (J.A. 1420). At a district court status hearing that same day, with appellant and his co-defendants present, government counsel indicated on the record that it had extended plea offers to the defendants which would expire "as of the moment [government counsel left]" the courtroom from the status hearing (9/27/04 Tr. 10-11, 21). Government counsel further

explained that, for the defendants who rejected the plea offers, it was "likely that the government [would] . . . super[s]ede with a RICO indictment," which would "also add other incidents," including "six bank robberies" and "two very serious assaults" in the coming weeks (*id*. at 11). Appellant did not accept the government's plea offer.

Following the expiration of appellant's plea, the grand jury returned a superseding indictment on November 9, 2004 (J.A. 76). As relevant here, the new indictment charged appellant with, inter alia, RICO conspiracy, two counts of carrying a machinegun in furtherance of a federal crime of violence in violation of 18 U.S.C. 924(c), and two counts of FIP (*id*. at 76-109).

On January 31, 2005, the district court held a status hearing with appellant and the five co-defendants with whom he eventually stood trial (J.A. 143). The district court explained that it was holding the hearing to discuss with each defendant, on the record, the details of the government's plea offers, as the court's "best way of making sure that everybody is on the same page," so that none of the defendants would claim in a later "[§] 2255 [motion] that they did not get a full discussion of the plea" (J.A. 157). The government noted that the plea offers,

including appellant's, had previously expired, that any new plea offers would require cooperation, and that, despite "inquir[ing] of several of the defendants . . . there [had been] no interest[ ] in" additional pleas if the pleas required cooperation (J.A. 152).

In the presence of all of the defendants, the Court discussed, seriatim, each of the defendants' previously-rejected plea offers (J.A. 164-85). A major topic of conversation throughout the hearing involved both the 30-year mandatory minimum sentences for the § 924(c) counts, and the fact that the government's plea offers, had they been accepted, would have allowed the defendants to avoid being charged with multiple § 924(c) counts (*id*. at 164, 169-70, 173, 176, 177-78, 180, 184-85). During the discussion of defendant Palmer's plea, government counsel explained:

> The [§] 924(c) [offense] charged in this case is for the use of a fully automatic firearm. All the . . . relevant firearms in this case have tested as fully automatic operational firearms and that does carry with it . . . a 30 year mandatory minimum consecutive sentence . . . . (J.A. 169-70.)

Again during the Palmer plea discussion, government counsel explained that if a "defendant is convicted of even one count of § 924(c), then it is a mandatory consecutive 360 months" of incarceration, and, moreover, if a defendant "is convicted even in the same indictment of two counts of §

924(c), then it is mandatory life" (*id.* at 164). During the discussion of defendant Burwell's plea, government counsel noted that if Burwell did not accept a plea, he would potentially face "another charge of § 924(c) which . . . [would be] . . . another opportunity for the government to pursue him for a 30-year mandatory minimum . . . ." (*id.* at 173). The prosecutor further referenced the 30-year mandatory minimum § 924(c) counts during defendant Spencer's plea discussion (*id.* at 180), and defendant Morrow's plea discussion (*id.* at 184-85). Morrow's trial counsel explained that one of the "risk[s] [Morrow ran]" by going to trial rather than pleading was that he "might not get [only] one count of § 924(c) [violation]," and that if he were convicted of "more than one § 924(c) [count], it goes from a mandatory 30 years to a mandatory life [sentence]."[18]

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[18] Morrow's plea discussion is germane here because the plea offers articulated by the prosecutor at the January 31 hearing were identical for Morrow and appellant; namely, to plead to one count of RICO conspiracy and one § 924(c) 30-year count (J.A. 175, 183). The prosecutor's on-the-record explication of the plea offer extended to appellant by letter on September 17, 2004, omitted the letter's requirement that appellant also plead guilty to one FIP count in violation of 18 U.S.C. § 922(g) (J.A. 1420).

It was in this context that the district court and the parties discussed appellant's plea offer. The prosecutor explained:

> [Appellant] is charged with having personally participated in four of the bank robberies. . . . *His [plea] offer was to, however, only one count of § 924(c) not four* and a RICO conspiracy and he would not have been required to cooperate. (J.A. 175.) (emphasis supplied).

The prosecutor explained that she had estimated appellant's applicable guidelines range based on the plea offer, including the "360 months mandatory minimum" for the § 924(c) count, to be 430 to 447 months (*id.* at 176). The prosecutor further noted:

> [Appellant] may very well be a career criminal offender under the sentencing guidelines, and if that were the case . . . it would [be] an offense level 37, criminal history level VI [for the RICO count], which . . . carries a range of 360 months to life. (*Id.*)

In a further discussion of the effect of appellant's plea on his guidelines calculations, the prosecutor stated:

> The differences mainly . . . would be three levels for acceptance of responsibility . . . . Also the major differences [would be] whether or not there [is] one or more than one conviction under [§] 924(c). But frankly . . . all it really does to the calculation is add back in the three additional level[s] that he otherwise would get for acceptance of responsibility, and so his new range would be 457 to 481 months. (J.A. 177-78.)

Appellant's trial counsel indicated the he had discussed the government's plea with appellant both with and without a potential career-offender finding by the district court, and indicated that appellant "rejected [the government's offer] then and he's rejecting it now" (J.A. 176). The district court asked appellant's trial counsel whether he had discussed the government's plea offer with appellant "[i]n terms of the [§] 924 (c) and what that involves;" appellant's counsel answered in the affirmative (*id*. at 177). Appellant confirmed that he had discussed with his attorney the "best calculation at this point" of what his applicable guidelines range would be under the proposed plea offer (*id*.). The district court then had the following colloquy with appellant:

> Court: Do you have any questions . . . of the court or your counsel?
>
> Appellant: No, Your Honor.
>
> Court: All right. Do you understand what was discussed?
>
> Appellant: Yes.
>
> Court: What's your decision in terms of the plea offer whether to accept it or not?
>
> Appellant: No acceptance. (J.A. 178.)

On February 5, 2005, the grand jury returned an additional superseding indictment, identical to the November 9, 2004, indictment

as to appellant in all respects, with the exception of an additional FIP count in violation of 18 U.S.C. § 922(g) (J.A. 110-142).

Following trial, the jury found appellant guilty as charged in the February 5, 2005, indictment, with the exception that the jury *acquitted* appellant of the machinegun, or fully automatic, aspect of both charged § 924(c) counts, and convicted him instead of two counts of possessing a *semi*automatic assault weapon in conjunction with a federal crime of violence (D.E. 473; S.A. 274-79) (verdict form)).

As relevant here, at appellant's sentencing, the district court agreed with the presentence report writer, and found that appellant qualified as a "career offender" because of two prior adult felony convictions, thus making his guidelines criminal history category VI (5/4/06 Tr. 9). The district court further found that the total offense level was 35 (*id.*). Because of the jury findings that appellant possessed *semi*automatic weapons, and not fully automatic machineguns during federal crimes of violence, his two § 924(c) counts carried mandatory minimum terms of 10 and 25 years, respectively (5/4/06 Tr. 5-6).

A. Applicable Legal Principles

In addition to the general precepts set out in Section I.A supra, a criminal defendant's right to effective assistance of counsel under the Sixth Amendment extends to the plea-bargaining process. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012). This Court employs the two-part *Strickland* test in analyzing an ineffective assistance of counsel claim arising out of the plea negotiations. *Lafler*, 566 U.S. at 162. First, a defendant must show that his counsel's performance fell "below an objective standard of reasonableness." *Id.* (citations and internal quotation marks omitted). A lawyer who makes a "plainly incorrect" estimate of a likely sentence due to ignorance of applicable law of which he should have been aware while advising his client on the prudence of accepting a plea offer falls below the threshold of reasonable performance. *United States v. Booze*, 293 F.3d 516, 518 (D.C. Cir. 2002). Second, a defendant must show that any error caused him prejudice. *Lafler*, 566 U.S. at 163. In order to establish *Strickland* prejudice in the plea context:

> [A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution

> would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164.

As relevant here, 18 U.S.C. § 924(c) imposes various mandatory-minimum sentences for the use of firearms in furtherance of a federal crime of violence. 18 U.S.C. § 924(c)(1)(B)(ii) provides that if the firearm at issue "is a machinegun [meaning a fully automatic weapon] . . . the person shall be sentenced to a term of imprisonment of not less than 30 years." 18 U.S.C. § 924(c)(1)(B)(i) provides that if the firearm is a "semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years." Second offenses involving machineguns require the offender to "be sentenced to imprisonment for life." 18 U.S.C. § 924(c)(1)(C)(ii). Second offenses involving semiautomatic assault weapons require "imprisonment of not less than 25 years." 18 U.S.C. § 924(c)(1)(C)(i). 18 U.S.C. § 924(c)(1)(D)(ii) further provides, in pertinent part, that the above mandatory-minimum sentences may not "run concurrently with any other term of imprisonment."

B. Discussion

Even assuming, as the district court did, the validity of appellant's contentions about his trial counsel, his claim fails.

Appellant misreads the factual record in two important ways, mistakes that fatally undermine his *Strickland* prejudice analysis. First, the record refutes the basic factual predicate for appellant's claim, namely, his contention (at 47-50, 52) that he was unaware that if he did not accept the government's plea offer he could face additional § 924(c) counts carrying additional mandatory time. Specifically, the September 27, 2004, and January 31, 2005, transcripts show that appellant rejected the government's plea offer despite the fact that he was informed both of the probability of additional charges, including § 924(c) counts, and of the mandatory time associated with those counts. In particular, the government stated in open court, in appellant's hearing, that it would add RICO and other charges related to six bank robberies on the last day the plea offer was open, September 27, 2004 (9/27/04 Tr. 11). Moreover, appellant attended the January 31 status conference and hence heard the parties' lengthy on-the-record discussions of the additional charges and potential penalties (J.A. 164, 169-70, 173, 176, 177-78, 180, 184-85).

Of course, this is the same information appellant now claims his defense counsel was ineffective for failing to provide to him (Appellant's Brief at 52).

Appellant accordingly cannot demonstrate *Strickland* prejudice, because even assuming arguendo counsel failed to tell appellant information he demonstrably knew, counsel's inaction could not have been the cause of appellant's rejection of the plea. *See, e.g., Lafler*, 566 U.S. at 164 (defendants must show that "*but for* the ineffective advice of counsel there is a reasonable probability that . . . [inter alia], the defendant would have accepted the plea") (emphasis supplied). Indeed, notwithstanding the parties' lengthy discussions of the § 924(c) issue, and even *after* the November 9, 2004, superseding indictment charged appellant with two counts of 924(c) (vitiating any need to speculate about potential *future* charges), appellant's counsel told the court in January 2005 that appellant had rejected the government's plea offer previously and was "rejecting it [again] now" (J.A. 176). And appellant himself confirmed to the court that he was not interested in the plea offer, even

after the government had returned an indictment with the additional charges (J.A. 178).[19]

Second, appellant misconstrues the nature of the government's plea offer, and, concomitantly, artificially inflates his alleged prejudice. At various times before the district court during the § 2255 proceedings, appellant characterized the government's plea offer as "a thirty (30) year

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[19] Appellant's suggestion (at 50-51) that he was somehow misled by government counsel's recitation of appellant's estimated guidelines range under the plea is similarly faulty. Rather, government counsel's discussion of the addition or subtraction of the "three levels [for] acceptance of responsibility" was in relation to the guidelines calculations for the non-§ 924 (c) counts to which appellant would have been required to plead, because, of course, the § 924(c) count contemplated by appellant's plea offer carried a mandatory-minimum of 30 years regardless of acceptance of responsibility (J.A. 177-78). The prosecutor further clarified this point by noting that "the major difference [aside from the other calculations] [is] whether or not there [is] *one or more than one conviction under [§] 924(c)*" (J.A. 177-78) (emphasis supplied). Any lingering ambiguity regarding the prosecutor's estimated guidelines calculation was vitiated by the prosecutor's caveat that appellant "may very well be a career criminal," an issue which both appellant's counsel and appellant conceded they had discussed, and which would wholly negate the prosecutor's other estimated guidelines calculations that appellant now contends were misleading (*id.* at 176-77). And, of course, the district court *did* in fact find at appellant's sentencing that he qualified as a career offender under the guidelines (5/4/06 Tr. 9). This career offender designation did not depend on whether appellant pled guilty in this case or went to trial, and thus rendered irrelevant any possible error in the prosecutor's estimated guidelines calculations at the January 2005 status hearing.

plea" or a "five year plea" (J.A. 1329, 1431, 1435). Appellant's brief before this Court also suggests that appellant would have been subject only to a "ten year mandatory minimum term, consecutive to any other term," for the single § 924(c) count contemplated by the plea (Brief for Appellant at 46).

All of these formulations are wrong; the government's plea offer would have resulted in a much higher sentence. As set out supra, the plea would have required appellant to plead guilty to possessing a *fully automatic machinegun* in furtherance of a crime of violence; an offense that, by itself, carried a 30 year mandatory-minimum sentence that could not run concurrently to any other sentence (J.A. 1421; 18 U.S.C. § 924(c)(1)(B)(ii)). In addition to the 30-year count, the government's plea offer required appellant to plead to RICO conspiracy, which carried with it a statutory maximum of life in prison (J.A. 1420-21; *see* 18 U.S.C. § 1962(d), -1963(a)); and one FIP count, in violation of 18 U.S.C. § 922(g). Appellant's guideline range for these counts alone likely would have been 210-262 months.[20] Therefore, a within-guidelines sentence based on

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[20] To determine appellant's applicable guidelines range had he pled, it is instructive to look to the presentence report and ultimate guidelines

appellant's acceptance of the government's plea offer would have been on the order of 570-622 months of incarceration, or roughly 47 to 51 years. This is a far cry from a 5-, 10-, or even a 30-year plea offer. Particularly in light of his rejection of the government's plea offer, even after the prosecutor speculated about a possible lower guidelines range (J.A. 176-78), appellant has not shown that, but for his trial counsel's actions, he

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calculation of the district court at appellant's actual sentencing in light of the 2005 sentencing guidelines, which applied at appellant's sentencing. As predicted by the prosecutor at the January 31, 2005, status hearing, the district court did in fact find that appellant was a "career offender" for guidelines purposes, thus making his criminal history category a VI (5/4/06 Tr. 9). Appellant would have been so designated whether he pled guilty or went to trial, because the "career offender" categorization was based on his prior felony convictions for attempted distribution of cocaine and armed robbery (*id.*; see also PSR at 15-16). Appellant's PSR writer, as well as the district court, calculated his total offense level as 35, which was based on the RICO conspiracy count as enhanced by certain acts in furtherance of the RICO count, as well as the § 922(g) count (5/4/06 Tr. 9; PSR at 13). Appellant did not object to these guidelines calculations at his sentencing.

All of these factors would have applied had appellant pled guilty, because the government's offer required him to plead both to the RICO conspiracy count and the § 922(g) count. Giving appellant a three-level reduction for acceptance of responsibility, his total offense level at his plea would have been reduced to a 32. An offense level of 32, combined with a criminal history category of IV, corresponds to an applicable guidelines range of 210-262 months. U.S. Sentencing Guidelines Manual, Sentencing Table (2005).

would have given up his right to contest the government's evidence at trial in return for a 47-51 year plea deal. *Lafler*, 566 U.S. at 164.[21]

[21] The district court rejected appellant's claim on *Strickland's* deficient performance prong, finding that appellant's counsel could not render deficient performance for failing to advise appellant about the likelihood of additional 924(c) counts that had not yet been charged at the time appellant rejected his plea. *Aguiar (I)*, 82 F. Supp. 3d at 80-81. Apart from one unreported case, none of appellant's cited cases (at 48-52) refute this analysis, and appellee is unaware of any reported case from this Court or the Supreme Court holding that a trial counsel is constitutionally ineffective for failing to inform his client of the possibility of future charges during plea negotiations. This Court need not address that issue here, because, as discussed in text supra, appellant cannot show *Strickland* prejudice. *See, e.g., Glover*, 872 F.3d at 630 (courts can deny *Strickland* claims on either prong).

If this Court disagrees and believes that whether counsel rendered deficient performance is dispositive, the appropriate course would be a remand to the district court for an evidentiary hearing. Appellee submits that it is highly unlikely that trial counsel failed to inform appellant about the possibility of additional § 924(c) counts during plea discussions, and/or failed to provide him with the government's plea letter of September 17, 2004. Indeed, during the January 31, 2005, hearing, appellant's trial counsel indicated both that he had discussed the government's plea offer with appellant at the time that it was extended, and, more specifically, had discussed the § 924(c) issue with appellant (J.A. 176-77).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief contains 12,441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally-spaced typeface.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Mr. Amit Vora, Esq., and Mr. Steven H. Goldblatt, Esq., on this 20th day of November, 2017.

/s/
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