04-0858-pr

To Be Argued By:
SANDRA S. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0858-pr

RICHARD MORALES,
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellee.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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NORA R. DANNEHY
Acting United States Attorney
District of Connecticut

SANDRA S. GLOVER
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

The district court (Alan H. Nevas, J.) had subject matter jurisdiction over this post-conviction proceeding under 28 U.S.C. § 2255. The district court denied the defendant's motion under § 2255 on November 12, 2003. *Morales v. United States*, 294 F. Supp. 2d 174 (D. Conn. 2003), Appendix ("A") 60, A290. Judgment entered on November 18, 2003. A60. On December 2, 2003, the defendant filed a motion to amend or correct the judgment under Fed. R. Civ. P. 59(e). A60, A312. On December 10, 2003, the district court denied the defendant's Rule 59(e) motion; judgment entered December 15, 2003. A60, A312 (endorsement order). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a) on January 28, 2004. A60, A330.

This Court has appellate jurisdiction under 28 U.S.C. § 2253. On March 17, 2004, the district court granted a certificate of appealability limited to the defendant's claim of ineffective assistance of appellate counsel for failing to raise on appeal the closure of the courtroom during one day of jury selection. A61, A331. On July 22, 2005, the district court amended the certificate of appealability to include the defendant's claim that his trial counsel was ineffective for failing to object to the closure of the courtroom during jury selection. A61, A333. On September 25, 2008, this Court further expanded the certificate of appealability to include a claim that the defendant's appellate counsel was ineffective in failing to raise a claim on appeal regarding the life sentence imposed on the narcotics conspiracy count. A336.

Statement of Issues Presented for Review

I. Whether the defendant was deprived of the effective assistance of counsel when his lawyer failed to challenge (at trial or on appeal) a purported closure of the courtroom during one day of jury selection when the district court found that there had been no closure of the courtroom and when the defendant cannot show that his lawyer's alleged failures caused him any prejudice.

II. Whether the defendant was deprived of the effective assistance of appellate counsel when his lawyer failed to raise a questionable challenge to one of his life sentences on appeal and when he cannot show that he was prejudiced by the failure because success on that claim would not have changed his total sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0858-pr

RICHARD MORALES,

Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Petitioner Richard Morales was convicted in 1995 – after a three-month trial – for crimes he committed as "Director of Security" for the Latin Kings in Connecticut. In 1996, Judge Alan Nevas sentenced him to six concurrent terms of life imprisonment. This is an appeal from the district court's denial of his motion to vacate his conviction under 28 U.S.C. § 2255.

In this appeal, Morales raises two claims of ineffective assistance of counsel. *First*, he complains that his lawyer failed to object to (and then failed to challenge on appeal) an alleged closure of the courtroom during one day of jury selection. In the ruling below, however, the district court found that the courtroom *was not* closed, and Morales has not shown that that finding is clearly erroneous. Indeed eleven defendants, eleven defense lawyers, and three prosecutors were in the courtroom during the events in question and not one of those people objected, thus corroborating the district court's conclusion that the courtroom was not closed. But even if the courtroom was closed, Morales still cannot succeed on his ineffective assistance of counsel claim because he cannot show that he was prejudiced by his counsel's alleged errors. There is no reasonable possibility that any error had an effect on Morales's convictions, and therefore it is highly unlikely that this Court would have vacated Morales's convictions and granted him the windfall of a new trial on plain error review.

Second, Morales argues that he received ineffective assistance of appellate counsel when his lawyer failed to argue that his life sentence on the drug conspiracy count was improper because the jury did not return a special verdict to identify the drug that was the object of the conspiracy. Putting aside the questionable merits of this argument, Morales cannot show that he was prejudiced by his lawyer's omission. He would not have met the third or fourth prongs of plain error review because he was serving five other concurrent life sentences. In other words, even if the argument were successful, he would still be facing

the same sentence: life in prison. Accordingly, Morales cannot show that he was prejudiced by his lawyer's actions, and his § 2255 petition was properly denied.

Statement of the Case

On December 8, 1994, a federal grand jury in New Haven returned a superseding indictment charging the defendant Richard Morales, and thirty-two others, in a thirty-eight count indictment related to their participation in the notorious Latin Kings street gang and its primary business of narcotics distribution. A11. Morales was charged in twelve counts of the indictment with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1926(c), (d); committing (or conspiring to commit) violent crimes in aid of racketeering ("VICAR"), including three murders, 18 U.S.C. § 1959(a)(1), (2), (5), (6); conspiring to possess with the intent to distribute various drugs, 21 U.S.C. §§ 841(a)(1), 846; and possession with the intent to distribute 50 or more grams of cocaine base, 21 U.S.C. § 841(a)(1), (b)(1)(A). *See* A64 (second superseding indictment). On September 29, 1995, after a three-month trial and four days of deliberation, a jury convicted Morales on all of the charges against him. A42.

On January 29, 1996, the district court (Alan H. Nevas, J.) sentenced Morales to six life terms, plus four 10-year terms and two 3-year terms, all to be served concurrently. A45-46. Morales's conviction and sentence were affirmed on appeal. *United States v. Diaz*, 176 F.3d 52 (2d Cir.), *cert. denied*, 528 U.S. 875 (1999).

On September 29, 2000, Morales filed a motion to vacate under 28 U.S.C. § 2255. A57, A245. The district court denied the motion to vacate on November 12, 2003. *Morales v. United States*, 294 F. Supp. 2d 174 (D. Conn. 2003); A60, A290. Judgment entered November 18, 2003, A60, and on December 2, 2003, the defendant filed a motion to amend or correct the judgment under Fed. R. Civ. P. 59(e). A60, A312. On December 10, 2003, the district court denied the defendant's Rule 59(e) motion. Judgment entered December 15, 2003. A60, A312. The defendant filed a timely notice of appeal on January 28, 2004. A60, A330.

On March 17, 2004 and July 22, 2005, the district court granted a certificate of appealability limited to the questions of whether Morales's trial or appellate counsel was ineffective in connection with Morales's claim regarding the alleged closure of the courtroom during one day of jury selection. A61, A331, A333. On September 25, 2008, this Court expanded the certificate of appealability to include a claim that Morales's appellate counsel was ineffective in failing to challenge Morales's life sentence on the narcotics conspiracy count. A336.

The defendant is currently serving the sentence imposed.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Offense Conduct

During the early 1990s, the Latin Kings were a powerfully organized street gang, "whose primary business was the distribution of narcotics by means of a racketeering enterprise conducted through a campaign of violent enforcement and retribution." *Diaz*, 176 F.3d at 73. The Latin Kings in Connecticut were governed by a four-person Board of Directors known as the "Supreme Crown." Within the Supreme Crown, Morales held the third most important position as Director of Security. *Id.* at 74.

Morales also "played [a]leading role[] in the activities of the Latin King chapter in Bridgeport where [he] resided." *Id.* Those activities included narcotics trafficking through multiple channels of distribution, as well as various murders and assaults in furtherance of the Latin Kings enterprise. *Id.* at 79, 83-84, 95-97. In particular, on December 14, 1992, Morales authorized the murder of Alex Aponte, whose actions posed a threat to one of the drug blocks operated by the Latin Kings in Bridgeport. *Id.* at 95. Morales also provided the firearms used in that murder. *Id.* In April and May 1994, Morales conspired with other Latin Kings to assault two individuals known as "Green Eyed Tito" and Victor Fontanez. *Id.* at 96. And on May 14, 1994, Morales ordered the assassination of Arosmo Diaz, whom Morales believed to be a police informant. *Id.* at 83-84. During that incident, the Latin

Kings also murdered an innocent bystander, Tyler White, who was killed because he happened to be with Diaz at the time. *Id.*

B. The Trial and Sentencing

From July through September 1995, Morales and eight other co-defendants were tried before a jury in Bridgeport. Jury selection began June 26, 1995 and continued through June 30, 1995. A31-32. Trial began July 5, 1995, and continued until September 29, 1995. During the course of this three-month trial, the Government presented "voluminous evidence" – including 144 witnesses and 500 exhibits – to prove the guilt of each defendant beyond a reasonable doubt. *Diaz*, 176 F.3d at 73. On September 29, 1995, the jury found Morales guilty of all twelve counts against him. A42.

On January 29, 1996, the district court (Alan H. Nevas, J.) sentenced Morales to six life terms, plus four 10-year terms and two 3-year terms, all to be served concurrently. A45-46. Morales's conviction and sentence were affirmed on appeal, *Diaz*, 176 F.3d 52.

C. The § 2255 petition

On September 29, 2000, Morales filed a motion to vacate under 28 U.S.C. § 2255. A57, A245. He argued, *inter alia*, that his lawyer was ineffective for failing to argue on appeal that the trial court violated his right to a public trial by closing the courtroom during one day of jury selection. A252-55. He also argued that his appellate

lawyer was ineffective for failing to challenge his life sentence on the drug conspiracy count. A256. He later amended his motion, with approval of the court, to include a claim that his trial counsel was ineffective for failing to object to the closure of the courtroom during jury selection. A59, A285.

The district court denied the motion to vacate on November 12, 2003, and subsequently denied a motion to amend or correct the judgment under Rule 59(e). A60, 290, 312. This appeal followed.

Summary of Argument

I. Morales's claim that his lawyer provided ineffective assistance of counsel by failing to challenge (at trial and on appeal) the alleged closure of the courtroom during one day of jury selection fails for several reasons. *First*, Morales cannot show that his lawyer performed unreasonably by failing to object to the alleged closure because the courtroom was not closed. In the decision below, Judge Nevas expressly found that he did not close the courtroom. With the benefit of hindsight, Morales contends that that factual finding is clearly erroneous, but that argument fails. Eleven defense lawyers, eleven defendants, and three prosecutors all heard Judge Nevas's comments, and not one of those people objected to a "closure." The absence of objection itself is strong evidence that *at the time*, nobody understood Judge Nevas to be closing the courtroom. The affidavits submitted by Morales do not alter this conclusion. The generic and general language in the affidavits – signed nearly seven

years after the trial – does not establish that Judge Nevas's finding of "no closure" is clearly erroneous.

Second, any closure of the courtroom was almost certainly trivial and as such would not warrant vacating Morales's convictions. Even on the most generous reading of the record for Morales, the courtroom was closed for one day of a five-day jury selection before a three-month trial. Moreover, there is no reason to believe that the closure subverted the goals to be protected by the Sixth Amendment's public trial guarantee.

Third, even if Morales's lawyer unreasonably failed to challenge the closure of the courtroom, Morales suffered no prejudice as a result of these failings. Prejudice may not be presumed, but rather must be shown by the petitioner. And here, Morales has not made the requisite showing. He has not shown that his lawyer was ineffective for failing to challenge the closure at trial because he cannot demonstrate that a challenge to the closure would have had any impact on the proceedings. And he cannot show that raising the issue on appeal would have been successful either. On appeal, the issue would have been reviewed for plain error, and there is no reasonable likelihood that this Court would have noticed a forfeited error when there was no possibility that it had any impact on the judgment against Morales.

II. Morales has not shown that he received ineffective assistance of appellate counsel based on his lawyer's failure to challenge his life sentence on the drug conspiracy count. *First*, Morales has not shown that his

lawyer provided objectively unreasonable performance by failing to raise a questionable legal challenge to his drug conspiracy life sentence. Morales claims that his lawyer should have argued that his life sentence on the drug conspiracy count was improper under the principle of *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984), that in the absence of a special verdict on a drug conspiracy charge that alleged a conspiracy to distribute multiple drugs, he should have been sentenced based on the charged drug with the lowest statutory penalties, namely marijuana. The *Orozco-Prada* Court, however, expressly carved out an exception for cases, such as here, where the defendant was also convicted of a substantive drug offense involving one of the charged drugs. Because Morales's case fell within this exception, it cannot be said that his lawyer acted unreasonably in declining to include this argument in his brief, especially when a successful resolution of this claim would have had no impact on Morales's total sentence.

Second, Morales has not shown that he was prejudiced by his lawyer's failure to raise the *Orozco-Prada* argument because even if he had raised it, it would have failed under plain error review. Morales was sentenced principally to six concurrent life sentences, and so even if the *Orozco-Prada* argument had succeeded in invalidating his life sentence on the drug conspiracy count, he still would have faced five valid life sentences. This Court has held that under these circumstances – when a claimed sentencing error on one count of a multi-count conviction would have no impact on the defendant's total effective sentence – the purported error does not meet the third "substantial rights"

prong of plain error review. Accordingly, because Morales's *Orozco-Prada* claim would have failed under plain error review, he suffered no prejudice from his lawyer's failure to raise that claim.

ARGUMENT

I. Morales did not receive ineffective assistance of counsel when his lawyer did not challenge – at trial or on appeal – the alleged closure of the courtroom during one day of jury selection.

A. Relevant facts

On June 21, 1995, in preparation for the upcoming, 11-defendant racketeering trial,[1] Judge Alan Nevas discussed with counsel the procedures to be used for jury selection. A104-107. During this discussion, he asked whether there were any comments on a proposal to close the courtroom during the individual questioning of potential jury members. A106. Defense counsel, including counsel for Morales, objected and there was no more discussion of the topic. A106-107.

On Monday June 26, 1995, Judge Alan Nevas opened jury selection in a small courtroom in the federal courthouse in Bridgeport, Connecticut. A31, A108. The larger courtrooms on the fourth floor were unavailable for

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[1] Two defendants pleaded guilty after jury selection, so by the time of verdict, there were only nine defendants.

use that summer due to renovations in the courthouse. A117.

For the first four days of jury selection, from June 26-29, the court and counsel questioned individual jury panel members on their responses to the jury questionnaire. Through this process, the court excused numerous members of the jury pool for cause. Once this process was completed, all of the remaining members of the jury pool would be called back into the courtroom to allow the lawyers to make their final decisions for jury selection. *See* A109-111 (describing procedure).

On Wednesday, June 28, it became clear that the individual voir dire would be completed by Thursday afternoon and that the final step in jury selection (*i.e.*, the exercise of peremptories) would occur on Friday, June 30. A132-35. With all counsel present, Judge Nevas further explained the process for Friday morning:

> Because at this point I don't know how many jurors we'll have left in the pool, I'm going to guess it's going to be somewhere around 50 or so, give or take. All of the rows in the spectator section of the courtroom are going to be used for the jurors to be seated. I'm not going to permit any spectators to be seated among the prospective jurors so that I want counsel to be on notice that on Friday there will be no room for any spectators. All of those seats are going to be taken by prospective jurors. So everyone should be aware of that.

A135. None of the defense lawyers, defendants, or prosecutors raised any concerns about the proposed process or objected to any portion of it.

The next day, June 29, the court estimated that by Friday, they would have approximately 50 members of the jury pool remaining from which to select the jury. A140. Again, with all eleven defense lawyers, eleven defendants, and three prosecutors present, the court explained the logistical issues presented by the large jury pool remaining:

> I think tomorrow I would just advise the clerk and also the marshals and CSO's, when the jurors come tomorrow I think they should go to the jury assembly room just down the hall here, which we have not been using but tomorrow we will use it, and then when we're ready to begin and everyone is here, I will then bring the jurors in and as I indicated yesterday for the benefit of anyone who was not here yesterday, in the spectator section there's not going to be any room for spectators tomorrow morning because the jurors will be seated, will be filling all the rows of the spectator section. So there just isn't going to be any room tomorrow for spectators.

A142-43. Again, although eleven defense lawyers, eleven defendants and three prosecutors heard these comments, no one objected to the court's proposed process for the next day.

The next day, June 30, the court excused several more jury pool members for cause, after individual questioning. A147-93. After this process was completed, the entire jury pool was brought into the courtroom to say their names for the lawyers, and then the lawyers exercised their peremptory challenges. A196-99. Defense lawyers challenged the Government's exercise of its peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), but the court ultimately rejected this argument. A199-226.

After the three-month trial resulted in convictions for the nine trial defendants, and after Morales was sentenced principally to six concurrent terms of life imprisonment, Morales appealed. He was represented on appeal by his trial counsel, and his appeal was consolidated with the appeals of twelve co-defendants. Although the defendants raised scores of issues on appeal, *see Diaz*, 176 F.3d at 52, no defendant, including Morales, complained about an alleged closure of the courtroom during jury selection. On May 4, 1999, this Court affirmed the judgments against all the defendants in all respects. *Id.*

On September 29, 2000, Morales filed a motion to vacate under 28 U.S.C. § 2255. A57, A245. He argued, *inter alia*, that his lawyer was ineffective for failing to argue on appeal that the trial court violated his right to a public trial by closing the courtroom during one day of jury selection. A252-55. He later amended his motion, with approval of the court, to include a claim that his trial counsel was ineffective for failing to object to the closure. A59, A285.

Judge Nevas denied the motion to vacate on November 12, 2003. *Morales v. United States*, 294 F. Supp. 2d 174 (D. Conn. 2003); A60, A290. He concluded that Morales's appellate counsel was not ineffective for failing to appeal the closed courtroom during jury selection "because the trial court did not actually close the courtroom." A292. The court reviewed the transcript and explained that "the court *did not* bar any specific person from the proceedings, or in any way prohibited the public from being present. The court simply gave notice to counsel that the gallery would be reserved for the prospective jurors, so that a final jury for Morales's trial could be selected." A293. As the court noted, a trial court is given wide latitude to keep order in the courtroom and to adopt procedures to run a fair and efficient courtroom. A293-94. Here, according to the court, the court's decision to reserve the gallery for prospective jurors fell within that broad discretion. A294.

The court acknowledged that when a courtroom is closed over a defendant's objection, the judge must make findings to support that closure. A295. This rule was inapplicable in the present setting, however, because the courtroom was never closed. A295. Judge Nevas concluded that any appeal on the courtroom closure issue "would have been frivolous." A295.

B. Governing law and standard of review

1. Public trial

The Sixth Amendment to the Constitution guarantees to a criminal defendant the right to a "public trial." U.S. Const., Amend. VI. Under this clause, "[a] defendant has a right to a trial that is open to members of the public." *Owens v. United States*, 483 F.3d 48, 61 (1st Cir. 2007). The right to a public trial includes the right to a public jury selection. *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984).

The Sixth Amendment's guarantee of a public trial "is for the benefit of the defendant; a trial is far more likely to be fair when the watchful eye of the public is present." *Owens*, 483 F.3d at 61. *See also Waller v. Georgia*, 467 U.S. 39, 46 (1984). Furthermore, a public trial helps ensure that the judge and prosecutors "carry out their duties responsibly," "encourages witnesses to come forward[,] and discourages perjury." *Waller*, 467 U.S. at 46.

In light of the values served by a public trial, the closure of a trial is to be a rare occurrence. *Press Enterprise*, 464 U.S. at 509. Accordingly, the Supreme Court in *Waller* established a multi-pronged test for closing a proceeding. This standard requires a court to consider whether the closure advances an "'overriding interest that is likely to be prejudiced,'" whether the closure is "'no broader than necessary to protect that interest,'" and whether there are "'reasonable

alternatives'" to closure. In addition, the court must "'make findings adequate to support the closure.'" *Rodriguez v. Miller*, 537 F.3d 102, 108 (2d Cir. 2008) (quoting *Waller*, 467 U.S. at 48).

A violation of a defendant's Sixth Amendment's right to a public trial is a "structural" error not subject to harmless error analysis. *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006); *Peterson v. Williams*, 85 F.3d 39, 40 (2d Cir. 1996); *Purvis v. Crosby*, 451 F.3d 734, 740 (11th Cir. 2006). As such, "a defendant who properly preserves the issue at trial and presents it on direct appeal is not required to establish that he was specifically prejudiced by the closure." *Purvis*, 451 F.3d at 740.

Nonetheless, "this does not mean that the Sixth Amendment is violated every time the public is excluded from a courtroom." *Peterson*, 85 F.3d at 40. The *Waller* Court specifically envisaged that a courtroom could be closed consistent with the Constitution if the trial court considers the various interests involved and makes appropriate findings. *Waller*, 467 U.S. at 44-48. But even an unjustified closure will not violate the Sixth Amendment if it was "trivial." *Peterson*, 85 F.3d at 40; *see also Gibbons v. Savage*, 07-3306-pr, slip op. at 13-16 (2d Cir. Jan. 28, 2009).

Finally, even if a court finds a violation of the Sixth Amendment, the remedy is not automatically a new trial. As this Court has explained, "a new trial is not required to remedy a violation of the public trial guarantee if some other relief would cure the violation." *Yung v. Walker*, 468

F.3d 169, 177 (2d Cir. 2006). In other words, "the remedy should be appropriate to the violation." *Waller*, 467 U.S. at 50. Thus, in *Waller*, where the Sixth Amendment violation involved the erroneous closure of a suppression hearing before trial, the Supreme Court ordered a new suppression hearing. *Id.* Through this choice of remedy, the Court sought to avoid providing the defendant the "windfall" of a new trial – a windfall the Court expressly found would not be in the public interest – if after a new suppression hearing the same evidence was suppressed. *Id.*

2. Ineffective assistance of counsel

A defendant challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections, as "'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

In *Strickland*, the Supreme Court held that to prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance "fell

below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. 466 U.S. at 688, 692. *See also Carrion v. Smith*, 549 F.3d 583, 588 (2d Cir. 2008).

> To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance," [*Strickland*, 466 U.S.] at 690, and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Brown v. Artuz, 124 F.3d 73, 79-80 (2d Cir. 1997). If the defendant fails to satisfy one prong, the Court need not consider the other. *See Strickland*, 466 U.S. at 697.

To establish ineffective assistance of appellate counsel, a petitioner must establish the same two-part performance and prejudice test announced in *Strickland*. *See Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). "In attempting to demonstrate that appellate counsel's failure to raise a . . . claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 754 (1983)); *Knox v. United States*, 400 F.3d 519, 521 (7th Cir. 2005). "Lawyers must curtail the number of issues they present [on appeal], not only because briefs are

limited in length but also because the more issues a brief presents the less attention each receives, and thin presentation may submerge or forfeit a point." *Knox*, 400 F.3d at 521.

"In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, 'viewed as of the time of counsel's conduct,' . . . and may not use hindsight to second-guess his strategy choices." *Mayo*, 13 F.3d at 533 (quoting *Strickland*, 466 U.S. at 690). By contrast, the "prejudice" inquiry "may be made with the benefit of hindsight." *Mayo*, 13 F.3d at 534 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 371-73 (1993)). *See also Mosby v. Senkowski*, 470 F.3d 515, 524 (2d Cir. 2006) ("[T]he Supreme Court has held that current law should be applied retroactively for purposes of determining whether a party has demonstrated prejudice under *Strickland*'s second prong."), *cert. denied*, 128 S. Ct. 75 (2007).

3. Standard of review

"'On an appeal from the denial of a § 2255 motion, [this Court] review[s] a district court's conclusions of law *de novo* but will accept its factual findings unless they are clearly erroneous.'" *Ventry v. United States*, 539 F.3d 102, 110 (2d Cir. 2008) (quoting *Sapia v. United States*, 433 F.3d 212, 216 (2d Cir. 2005)). "The question of whether a defendant's lawyer's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*" by an appellate court. *United States v. Hernandez*, 242

F.3d 110, 112 (2d Cir. 2001) (per curiam) (internal quotation marks omitted). *See also United States v. Kaid*, 502 F.3d 43, 45 (2d Cir. 2007) (per curiam).

C. Discussion

1. Morales's lawyer did not provide objectively unreasonable performance by failing to object because the courtroom was not closed.

The premise of Morales's ineffective assistance of counsel claim is that Judge Nevas closed the courtroom for the final day of jury selection. In the ruling below, however, Judge Nevas found otherwise, and Morales has not shown that that factual finding is clearly erroneous. *See Ventry*, 539 F.3d at 110 (clearly erroneous standard of review for factual findings).

Judge Nevas found that he did not need to consider whether the closure was justified "because the court never ordered that the courtroom be closed." A293. He reviewed the transcript and concluded as follows:

> [T]he court *did not* bar any specific person from the proceedings, or in any way prohibited the public from being present. The court simply gave notice to counsel that the gallery would be reserved for the prospective jurors, so that a final jury for Morales's trial could be selected.

A293.

The court continued by providing a skeletal explanation for its decision to prohibit spectators from sitting with the jury pool members. A293-94. As the court noted, however, the general rule that a court must make express findings before closing a courtroom was inapplicable because "the court never actually closed the courtroom, nor was there a motion to do so, and, at the time, Morales did not object to the court's simple act of reserving the gallery for the prospective jurors." A295. Furthermore, Judge Nevas found that "there is no evidence that any member of the public, including Morales's friends and family, or the press, was specifically excluded from the proceedings." A295 n.1. Thus, Judge Nevas concluded that an appeal on this issue would have been frivolous and the district court's action would have been affirmed. A295.

In a subsequent decision granting Morales a certificate of appealability, Judge Nevas noted that the court had merely "used all available space to accommodate prospective jurors during voir dire, leaving the press and the public with standing room only." A332.

Judge Nevas's finding that he did not close the courtroom is supported by the record and accordingly is not clearly erroneous. As is evident from the transcript, nobody asked for the courtroom to be closed and there was no express order closing the courtroom. Furthermore, on the day the courtroom was allegedly closed, the record reveals absolutely no comments from Judge Nevas that could be interpreted as closing the courtroom or excluding any individual or member of the press.

In the absence of an express closure order, Morales focuses on the two statements by the court regarding the need to reserve the gallery of the small courtroom for the jury pool members on Friday, *see* A135, A142-43, and argues that those statements amounted to a closure order. Appellant's Brief at 42, 46. But those arguments are made from a reading of the cold transcript with the benefit of hindsight. Crucially for purposes of Morales's ineffective assistance of counsel claim, nobody in the courtroom at the time – including the Judge – interpreted the comments as closing the courtroom. *At a minimum*, eleven defendants, eleven defense lawyers, and three prosecutors heard Judge Nevas's comments and *nobody* objected or challenged the Judge's statements. This lack of objection is especially telling because the defendants had previously objected to a proposal to close the courtroom for voir dire. *See* A106. In other words, when the question of closing the courtroom during jury selection was raised with the defendants, they objected. The fact that they did not voice the same objection again just a few days later in response to Judge Nevas's comments on jury selection procedure supports the inference that nobody in the courtroom interpreted those comments as closing the courtroom.

Morales also points to two affidavits he submitted in support of his § 2255 petition that he claims support the conclusion that the courtroom was closed. Those skeletal affidavits, however, do not undermine Judge Nevas's factual finding that he did not close the courtroom.

Standing alone, the affidavits do not support Morales's contention that the courtroom was closed. The two

affidavits – signed nearly seven years after the events in question – identify the declarant and then state, in identical language, the following: "That on June 30, 1995, I attempted to attend the jury selection in the trial of United States of America v. Richard Morales, Crim. No. 3:94cr112(AHN), but was denied entry into the courtroom by courthouse staff." A288-89. These generic and general statements, even if true, do not establish a violation of Morales's right to a public trial. They do not provide any details about the events in question, details that would be necessary to determine whether the courtroom was closed to the public. For example, the affidavits do not explain what time the women attempted to enter the courtroom or what they were told by "courthouse staff." They do not explain *why* the women were denied entry, for how long they were denied entry (if at all), or whether the women were subsequently admitted. As written, these affidavits raise more questions than they answer about the alleged closure of the courtroom and, even taking the allegations as true, leave open the possibility of multiple factual scenarios that do not involve a "closure" of the courtroom. In sum, these affidavits do not help the defendant in his attempt to prove that the courtroom was closed for jury selection. *See United States v. Lipscomb*, 539 F.3d 32, 42-43 (1st Cir. 2008) (rejecting as insufficient a declaration stating that the declarant could not attend closing arguments where the defendant had not produced any other evidence to support a claim that the courtroom was closed), *cert. denied*, __ S. Ct. __, 2009 WL 56596 (Jan. 12, 2009).

Moreover, to the extent that Morales relies on these affidavits to buttress his claim that his lawyer should have understood Judge Nevas's comments as closing the courtroom, they are insufficient to the task. The affiants make no claim that they alerted Morales or his lawyer to their purported exclusion from the courtroom, and thus, even if "courthouse staff" interpreted Judge Nevas's comments as a closure order and excluded the two affiants in compliance with that "order," there is no record evidence that Morales's lawyer was aware of this exclusion, either at the time of trial or at any time before the appeal was resolved. Thus, in the absence of any record that Morales's lawyer knew about the allegations contained in the affidavits, he cannot be faulted for failing to raise an objection based on those allegations.

In sum, although Morales has the burden of showing that the courtroom was closed to support his claim of ineffective assistance of counsel, *see Carrion*, 549 F.3d at 588, he has failed to do so. With the benefit of hindsight, he takes issue with Judge Nevas's factual findings but provides no compelling reason why this Court should reject those findings as clearly erroneous. He claims that the courtroom was closed based on ambiguous comments by the Judge, but offers no evidence (aside from his *post hoc* reading of the transcript) to support that claim. He supplies no affidavits from anyone in the courtroom – whether the defendants, the defense lawyers, or the courthouse staff – to support his contention that Judge Nevas closed the courtroom. In addition, he supplies no evidence on when the courtroom was closed, how long it was closed, when spectators were allegedly excluded from

the courtroom, and for what parts of the day they were excluded. On this bare record, Morales has not shown that the courtroom was closed, or that Judge Nevas's finding to the contrary was clearly erroneous.[2]

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[2] Because Morales has also not shown that he was prejudiced by any failure of his lawyer, *see* Part I.C.3., *infra*, the Court need not resolve whether the courtroom was actually closed or whether his lawyer was objectively unreasonable in failing to challenge the alleged closure at trial or on appeal. To the extent this Court disagrees, however, or believes that there is ambiguity in the record about the events of June 30, 1995, it should remand for an evidentiary hearing on whether, and to what extent, the courtroom was closed that day. *See Owens*, 483 F.3d at 66 (remanding for evidentiary hearing on nature and extent of courtroom closure).

In addition, even if this Court were to conclude that the courtroom was closed, a remand would still be appropriate to allow the Government to present evidence in a "reconstruction" hearing on the propriety of the closure. *See, e.g.*, *Nieblas v. Smith*, 204 F.3d 29, 32 (2d Cir. 1999) (approving a reconstruction hearing on the propriety of the closure as appropriate alternative to "granting the defendant the 'windfall' of a new trial . . . where the alleged constitutional violation does not affect the fairness of the outcome at trial").

Finally, the record includes no evidence from Morales's attorney about his actions, and accordingly, a remand would be appropriate to allow him the opportunity to be heard on the issues in this case. *See, e.g.*, *Eze v. Senkowski*, 321 F.3d 110, 112-13 (2d Cir. 2003) (remanding for evidentiary hearing to allow allegedly ineffective attorney the opportunity to explain his actions, citing *Sparman v. Edwards*, 154 F.3d 51, 52 (2d

(continued...)

2. Even if the courtroom was closed, any such closure was trivial and accordingly there was no basis for challenging the closure.

Not all courtroom closures violate the Sixth Amendment because a closure might be "so trivial as not to violate" the amendment. *Peterson*, 85 F.3d at 40; *Gibbons*, slip op. at 13-16. The triviality standard is not a question of harmless error or lack of prejudice to the defendant:

> Rather, a triviality inquiry looks 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." This analysis turns on whether the closure subverts the values the drafters of the Sixth Amendment sought to protect: "1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury."

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[2] (...continued)
Cir. 1998), for the proposition that such an opportunity should be provided to counsel "except in highly unusual circumstances"). Here, for example, such an explanation could shed light on rational reasons for the actions taken (or not taken), reasons that were presumably shared by the other ten defense lawyers in the courtroom at the time.

Smith, 448 F.3d at 540 (quoting *Peterson*, 85 F.3d at 42-43) (internal citations omitted).

The triviality inquiry turns on a review of the "totality of the circumstances." *United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 134-35 (2d Cir. 2007). Thus, in *Peterson*, after reviewing all of the facts, this Court found an unjustified courtroom closure was trivial "notwithstanding that the inadvertently extended closure occurred during one of the most important portions of the trial." *Gibbons*, slip op. at 16 (describing *Peterson*). Similarly, in this Court's *Gibbons* decision, handed down today, the Court found that an unjustified closure for one afternoon of a multi-day jury selection was "too trivial to warrant the remedy of nullifying an otherwise properly conducted state court criminal trial." *Id.* at 17. There, the Court found that "nothing of significance happened during the part of the session that took part in the [closed] courtroom," and accordingly there was no basis for vacating the conviction. *Id.*

Here, as in *Peterson* and *Gibbons*, the alleged closure in this case was trivial because it was a relatively small part of the trial, and it did not "subvert the values" protected by the Sixth Amendment. *Smith*, 448 F.3d at 540. The closure here was, *at most*, for one day of a five-day jury selection before a three-month trial.[3] There is no

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[3] Although Morales assumes that the courtroom was closed all day, the record is simply insufficient to support that assumption. On the current record, even assuming the truth of (continued...)

allegation that any other part of the trial was closed improperly. *See Press Enterprise*, 464 U.S. at 513 (finding courtroom closure improper when the trial court "closed an incredible *six* weeks of *voir dire* without considering alternatives"); *but see Owens*, 483 F.3d at 54, 62-63 (rejecting argument that closure for jury selection lasting one day was trivial).

Moreover, there is no reason to believe that the court's alleged closure subverted the values to be protected by the Sixth Amendment. Because the alleged closure occurred during jury selection, there is no reason to believe that the closure compromised any of the values protected by the public trial guarantee. Furthermore, there is no reason to believe that those goals were subverted with respect to the jury selection more narrowly. Only a handful of jurors were questioned individually on the final day of jury selection and thus the overwhelming majority of individual questioning was conducted in an indisputably public courtroom. And while the parties did exercise their peremptory challenges that day, that fact alone does not preclude a finding of triviality. Even if the exercise of

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[3] (...continued)
the statements in the affidavits, it is entirely possible that the two affiants were only denied entry for a short period of time. Nonetheless, for purposes of this argument, the Government has assumed that the courtroom was closed for the entire last day of jury selection. The Government notes that the record reflects that at least one person attended the proceedings to observe jury selection: a newly-appointed district judge observed the proceedings that day. A147.

peremptory challenges could be described as one of the most important portions of the trial – a difficult argument to make for a three-month trial – under *Peterson*, this would not preclude a finding of triviality.

These conclusions have even more force if the courthouse staff closed the courtroom without the knowledge of Judge Nevas or the parties. If Judge Nevas and the parties were unaware that the courtroom was closed, then the goals of the public trial guarantee were served by the *possibility* that the public could enter the courtroom at any time. *See Peterson*, 85 F.3d at 43 (noting that the courtroom closure could not have encouraged perjury in the defendant who testified during the closure because the defendant was unaware of the closure during his testimony).

In sum, even if the courtroom was closed for the final day of jury selection, any such closure was trivial. Morales's lawyer cannot be faulted for failing to object to (or for failing to appeal) a trivial closure of the courtroom.

3. Assuming that the courtroom was improperly closed, Morales has not shown that he was prejudiced by his lawyer's failure to object to the closure, either at trial or on appeal.

a. Morales must show prejudice from his counsel's alleged errors.

To succeed on his ineffective assistance of counsel claim, Morales must show not only that his lawyer provided objectively unreasonable representation, but also that he was prejudiced by his lawyer's errors. *Strickland*, 466 U.S. at 687; *Henry v. Poole*, 409 F.3d 48, 63 (2d Cir. 2005). The "prejudice" prong of the *Strickland* standard asks the "court to determine whether, but for counsel's deficient performance, 'there is a reasonable probability that . . . the result of the proceeding would have been different.'" *Henry*, 409 F.3d at 63 (quoting *Strickland*, 466 U.S. at 694).

Despite this well-established standard for ineffective assistance of counsel claims, Morales argues that the prejudice prong is presumed to be satisfied when the lawyer's failure is a failure to challenge a structural error. In other words, according to Morales, if a lawyer fails to object to (or fails to appeal) a structural error, the defendant has automatically established prejudice for purposes of the second prong of *Strickland*. Appellant's Brief at 20-23, 45.

Morales is mistaken. As the Eleventh Circuit noted in response to this very argument, "[i]t is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim." *Purvis*, 451 F.3d at 740.

The *Purvis* Court noted that in *Strickland*, the Supreme Court identified only three categories of cases in which a petitioner was not required to show prejudice: cases involving the denial of counsel altogether, cases involving state interference with counsel's assistance, and cases involving a counsel's conflict of interest. *Id.* at 740-41. Outside these three categories, prejudice must be shown:

> [A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to the likelihood of causing prejudice.

Strickland, 466 U.S. at 693. The Supreme Court reiterated this principle in *Roe*, explaining that a defendant claiming he received ineffective assistance of counsel must prove

prejudice unless there is some allegation that he was denied the assistance of counsel altogether. 528 U.S. at 482-83. Morales's proposed standard would directly contravene this direction from the Supreme Court and create a fourth category of "presumed prejudice" cases.

Furthermore, Morales's proposed standard would be inconsistent with a line of cases holding that when a defendant raises a procedurally defaulted "structural" claim in a collateral proceeding, he still must show cause *and prejudice* to overcome that default. Thus, in *Francis v. Henderson*, 425 U.S. 536 (1976), the petitioner claimed that blacks had been systematically excluded from the grand jury in his case, thus raising a structural error claim which would have been presumed prejudicial on direct appeal. In *Francis*, however, the petitioner was raising his claim in a collateral attack on his conviction and faced a procedural bar. He argued that he should not be required to prove actual prejudice, but the Supreme Court rejected that argument: "In a collateral attack upon a conviction, [our prior cases] require[] not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice." *Id.* at 542. The Court continued in a footnote by saying that "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Id.* at 542 n.6. The Supreme Court's decision rested on its earlier decision in *Davis v. United States*, 411 U.S. 233, 245 (1973), when it held that while prejudice could be presumed from the

systematic exclusion of blacks from a federal grand jury, a showing of *actual* prejudice was still necessary to overcome a procedural default on collateral review.

The Eleventh Circuit succinctly explained the relevance of these cases to the present context:

> For the same reasons that prejudice cannot be presumed in order to satisfy the prejudice requirement when an objection to structural error was not made at trial, it cannot be presumed to satisfy the prejudice component of an ineffective assistance claim arising from the same failure to preserve the structural error. . . . Any defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing that claim in ineffective assistance garb and asserting that prejudice must be presumed.

Purvis, 451 F.3d at 743.

These cases and the standards they impose embody the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their] finality." *Ciak v. United States*, 59 F.3d 296, 301 (2d Cir. 1995). Accordingly, "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). As the Supreme Court explained in *Frady*, the standards that apply on direct appeals are "out of place when a prisoner launches a collateral attack against a

criminal conviction after a society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on direct appeal." *Id.* at 164. There, with respect to the claimed error in jury instructions before it, the Court noted that *"[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Id.* at 166 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (emphasis added in *Frady*). This same standard applies in § 2255 proceedings. *Id.* Accordingly, a showing of ineffective assistance must be *at least* as difficult for a petitioner to make as a showing of plain error.

Nevertheless, in support of his argument, Morales relies primarily on *Bloomer v. United States*, 162 F.3d 187 (2d Cir. 1998). That case is distinguishable and is also in tension with more recent cases on the appropriate scope of plain error review.[4] In *Bloomer*, this Court considered a

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[4] Morales also relies on the First Circuit's decision in *Owens*, 483 F.3d at 64-66, which concluded that the presumed prejudice from the alleged closure of a trial during jury selection would automatically satisfy both the prejudice requirement for overcoming a procedural default and the prejudice requirement for an ineffective assistance of counsel claim. This conclusion was dicta because the court ultimately remanded to the district court for an evidentiary hearing on the nature and extent of the courtroom closure. In addition, the (continued...)

claim of ineffective assistance of counsel related to a lawyer's failure to challenge a constitutionally deficient jury instruction on reasonable doubt. In discussing the prejudice prong of *Strickland*, the Court relied on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), when it stated that "we will presume prejudice when a jury instruction on reasonable doubt is found to be constitutionally deficient." 162 F.3d at 194. With no discussion or elaboration, the Court stated that "[w]hile the *Sullivan* analysis originates in cases directly reviewing jury instructions, rather than in ineffective assistance cases based on a failure to object to defective jury instructions, the force of its reasoning and its conclusion apply equally here." *Id.*

From this cursory equation of cases on direct review with cases on collateral review, it appears that the Court was not confronted with the inconsistency between its ruling and the rule, described above, that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *Frady*, 456 U.S. at 166.

Furthermore, it does not appear that the *Bloomer* Court considered the additional inconsistency between its ruling and the standards governing plain error review of unpreserved errors. As described below, *see*, Part I.C.3.c., *infra*, an unpreserved claim is reviewed on direct appeal only for plain error. And under established Supreme Court

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[4] (...continued)
decision in *Owens* suffers from the same infirmities as the *Bloomer* decision.

precedent, even if a structural error meets the first three prongs of plain error review (*i.e.*, there was error, it was plain, and it affects substantial rights), it does not require reversal of the conviction unless the error impacted the fairness, integrity or public reputation of judicial proceedings. Thus, it is possible that a conviction marred by a structural error could still be upheld on appeal because the error did not adversely impact the fairness, integrity or public reputation of judicial proceedings. The *Bloomer* ruling, though, would preclude consideration of that possibility on collateral review by "presuming" that an error was prejudicial. In other words, under the *Bloomer* standard, a conviction that would have been upheld on direct review (because the error did not meet the fourth prong of plain error review) would nevertheless be overturned on collateral attack because prejudice would be presumed.[5]

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[5] Although the ruling in *Bloomer* seems anomalous given the standards for plain error review, it is possible to understand *Bloomer* as effectively concluding that even on plain error review, the conviction in that case would have been reversed. The error in *Bloomer* was an erroneous jury instruction on reasonable doubt, an error that meant that there was no jury verdict on "guilt beyond a reasonable doubt." This type of error would likely be corrected even on plain error review because the conviction of a defendant without a jury verdict on guilt would seriously undermine the fairness, integrity and public reputation of judicial proceedings. Thus, in *Bloomer*, the Court's "presumption" of prejudice was merely an acknowledgment that any prejudice inquiry would necessarily meet the standard for reversal of the conviction. As described

(continued...)

In sum, prejudice cannot be presumed. But as shown below, Morales cannot show prejudice with respect to any error at trial or on appeal.

b. Morales cannot show that his lawyer's failure to object to the closure at trial caused him any prejudice.

Assuming that trial counsel's failure to object to the partial closure of the courtroom was error, Morales cannot show that he was prejudiced by the error.

If counsel had objected in a timely fashion and thus persuaded Judge Nevas not to partially close the courtroom, there is no reason to believe that anyone – whether the judge, the prosecutors, or defense lawyers – would have acted any differently. Morales contends that the relevant parties would have known "they were acting under the scrutiny of the public," Appellant's Brief at 44, but fails to explain how that would have changed any portion of the proceeding. Moreover, if the courtroom was closed by courthouse personnel without knowledge of the judge or the parties, there is no reason to believe that an open courtroom would have changed anything. Alternatively, it is possible that if Morales's lawyer had objected, Judge Nevas would have gone through the *Waller* inquiry and appropriately closed the courtroom, in which case, there would have been no change in the parties' behavior. All in all, there is no basis to believe that

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[5] (...continued)
below, the result is not the same for this case.

a timely objection to closure would have changed anything about the jury selection that day. And since Morales bears the burden of proof on this topic, he has not sustained that burden.

Morales contends that if his trial lawyer had objected, then he would have preserved the issue for appellate review and thus obtained a new trial on appeal. Appellant's Brief at 44. But the question is not whether trial counsel's actions would have had any impact on the appeal, but rather whether they prejudiced the defendant at the trial level. The Eleventh Circuit made this precise point when it rejected a nearly identical claim in *Purvis*:

> There are two flaws with [the defendant's argument on prejudice]. One is its assumption that the trial judge would have overruled an objection if one had been made. There is as much reason to believe that pointing out the error of his ways to the trial judge would have caused him to mend those ways, thereby depriving Purvis of the issue on appeal. The second and more fundamental flaw in this argument is that it focuses on the outcome of the appeal, not of the trial. The Supreme Court in *Strickland* told us that when the claimed error of counsel occurred at the guilt stage of a trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal.

Purvis, 451 F.3d at 739 (citation omitted).

In sum, Morales has failed to show that he was prejudiced by his trial lawyer's failure to object to the closure of the courtroom during jury selection.

c. Morales cannot show that his lawyer's failure to challenge the closure on appeal caused him any prejudice.

Morales cannot show that his appellate lawyer's failure to appeal the closure issue prejudiced him because he cannot show that "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In addition to his argument that prejudice is presumed, Appellant's Brief at 45, *but see* Part I.C.3.a., *supra*, Morales argues that because the error was structural, "there was a strong chance that this Court

would have found the error to have been plain."[6] Appellant's Brief at 44.

Morales's argument fails because he does not consider the fourth prong of plain error review. Because Morales did not object to the closure at trial, his claim would have been reviewed for plain error on appeal. *See* Fed. R. Crim. P. 52(b). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or, equivalently, 'obvious'"), *see United States v. Olano*, 507 U.S. 725, 734 (1993); and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S.

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[6] Morales cites two cases for the proposition that "[t]his Court has found plain error where a district court has closed a courtroom during criminal proceedings." Appellant's Brief at 39. Neither case is persuasive. *United States v. Lewis*, 424 F.3d 239 (2d Cir. 2005) was not a "public trial" case but rather a case involving a district court's failure to state the reasons for a sentence in open court in violation of 18 U.S.C. § 3553(c). And while *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973) was a "public trial" case, it was decided before the Supreme Court's modern "plain error" jurisprudence. Accordingly, the Court in that case did not discuss the application of the four "prongs" of plain error review. *Cf. Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (per curiam) (rejecting reliance on earlier cases that predated modern caselaw that reviews instructional errors for harmlessness).

461, 466-67 (1997). *See also United States v. Cotton*, 535 U.S. 625, 631-32 (2002). The Supreme Court has not yet decided "whether a structural error necessarily affects substantial rights, thereby automatically satisfying the third element of the plain error test." *United States v. Padilla*, 415 F.3d 211, 220 n.1 (1st Cir. 2005) (en banc). But even if structural error meets the substantial rights prong of the plain error test, it does not automatically qualify as plain error warranting relief.

That is, unpreserved claims of structural error must satisfy the fourth plain error prong to warrant relief on direct review. On this point, the Supreme Court's decision in *Johnson* is particular instructive. There, the petitioner argued that the district court's failure to submit a materiality instruction to her jury was a structural error which should be exempted from Rule 52(b) and the plain error standard. The Court rejected this argument:

> [Rule 52(b)] governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. We cautioned against any unwarranted expansion of Rule 52(b) in [an earlier case] because it would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed. . . . Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.

Johnson, 520 U.S. at 466 (internal citations and quotation marks omitted). The Court then applied the plain error standard. It found that the petitioner's structural error argument was relevant to the third "substantial rights" prong of the plain error analysis, but was one it did not need to decide because even assuming that the failure to submit materiality to the jury affected substantial rights, it did not meet the fourth plain error prong, that is, the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings warranting correction. *See also Cotton*, 535 U.S. at 632-34 (as in *Johnson*, the Court did not decide whether the respondents' claim constituted structural error and thereby satisfied the third prong of the plain error analysis because it found that even if their substantial rights were affected, the error did not qualify for relief under the fourth plain error prong).

This Court's cases similarly recognize that the fourth prong of plain error review applies to forfeited errors, even when the forfeited error is one claimed to be structural. *See United States v. Marcus*, 538 F.3d 97, 104 (2d Cir. 2008) (concurring opinion) ("These cases embody the Supreme Court's view that there is no 'miscarriage of justice' in refusing to notice forfeited errors that did not affect the judgment. . . . This is true even if the errors fall within the 'limited class' of 'structural errors' that 'affect [ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'") (internal citations omitted); *see also United States v. Knoll*, 116 F.3d 994, 999-1001 (2d Cir. 1997).

Here, there is no reasonable probability that Morales's conviction would have met the standards for reversal of his convictions under plain error review. Even if the first three prongs of plain error were assumed, *i.e.*, that there was error, that the error was plain, and that the error effected Morales's substantial rights, Morales would not have satisfied the fourth prong. Specifically, there is no reasonable probability that this Court would have found that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. Indeed, this Court in all likelihood would have found that to reverse Morales's conviction based on an error that could not possibly have effected the judgment would have undermined those very values.

Morales was tried with eight other defendants in a three-month trial in the summer of 1995. At trial, the Government called 144 witnesses and introduced over 500 exhibits. This "voluminous evidence," *Diaz*, 176 F.3d at 73, established that Morales was a leader in the Latin Kings – indeed he was the "Director of Security" – responsible for ordering and participating in multiple assaults, murders, and beatings. At the close of the three-month trial, the jury convicted Morales of all twelve counts against him, including RICO charges, drug conspiracy, drug possession, VICAR assault, VICAR conspiracy, and VICAR murder. A42. Judge Nevas sentenced him primarily to six life terms. A45-46.

By the time Morales's appeal was decided, it was May 1999, nearly four years after his trial. Morales's lawyer would have faced a significant uphill battle in arguing to

this Court that the forfeited error resulted in a "miscarriage of justice." *See Johnson*, 520 U.S. at 470. The jury convicted a violent and dangerous man of serious crimes and he was sentenced accordingly. There is no argument that the closed courtroom during one day of jury selection had any plausible impact on the jury's verdict.

Indeed, on these facts, where there is no argument that the error had *any* impact on the judgment, it would be the *reversal* of his convictions that would seriously affect the fairness, integrity or public reputation of judicial proceedings. The Supreme Court made this very point in *Johnson*. The forfeited error in that case was the failure to submit materiality to the jury. When the Court came to the fourth prong of the plain error inquiry, it reviewed the evidence of materiality and found it "overwhelming." 520 U.S. at 470. The Court continued:

> On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." . . . No "miscarriage of justice" will result here if we do not notice the error, . . . and we decline to do so.

Id. (citations omitted). *See also Marcus*, 538 F.3d at 104 (concurring opinion) ("Thus, where there is no reasonable

possibility that an error not objected to at trial had an effect on the judgment, the Supreme Court counsels us against exercising our discretion to notice that error.").

Here, just as in *Johnson*, there is no reasonable possibility that the closed courtroom during jury selection had any effect on the judgment. On these facts, it would have been the reversal of Morales's convictions that would have invited public ridicule of the judicial system. Accordingly, it is exceedingly unlikely that Morales's claim would have been successful on appeal. As such, Morales cannot show that he was prejudiced by his lawyer's failure to raise the issue to this Court.

II. Morales's lawyer was not ineffective on appeal for failing to challenge his life sentence on the drug conspiracy count because there was no merit to the argument and it would not have been successful on appeal in any event.

A. Relevant facts

The second superseding indictment charged Morales with two drug offenses. First, Count 27 of the second superseding indictment charged Morales with conspiring with multiple other co-defendants to possess with the intent to distribute and to distribute four different controlled substances: heroin, marijuana, cocaine and cocaine base. A98-99. Second, Count 28 charged Morales alone with possession with the intent to distribute 50 or more grams of cocaine base. A99.

The jury found Morales guilty of both drug offenses, A42. The Pre-Sentence Report (PSR) set forth the potential custodial penalties for both offenses as ten years to life imprisonment. *See* PSR cover page. Further, with respect to those counts, the PSR held that Morales was responsible for more than 1.5 kilograms of cocaine. ¶ 106. This conclusion set his offense level for the drug counts at 38, "[w]ithout considering the other drugs sold or supplied by Mr. Morales." ¶ 106. At sentencing, Morales challenged the drug quantity finding (a challenge quickly rejected by the court, Government Appendix ("GA") 28-30) but otherwise raised no objection to the calculation of his sentence on Count 27. The district court originally sentenced Morales to a term of ten years on both drug counts. A243. The Government objected to the sentence on Count 27, and Judge Nevas vacated the ten-year sentence to impose a sentence of life imprisonment on that count. A243-44. Defense counsel did not object. A244. On appeal, Morales raised numerous issues, but he did not challenge his life sentence on his drug conspiracy conviction.

In his § 2255 petition, Morales argued that he received ineffective assistance of appellate counsel because his lawyer failed to argue on appeal that his life sentence on the drug conspiracy count was improper. Specifically, he argued that because Count 27 charged him with conspiring to distribute four different drugs and the jury's verdict did not specify which drug it found, the district court was required to sentence him based on the drug carrying the lowest statutory penalty. According to Morales, his lawyer

was constitutionally ineffective for failing to raise this issue on appeal. A248-49, A256.

The district court rejected this argument. A298-300. The court acknowledged that prior decisions by this Court had established a rule that "when faced with a general verdict for conspiracy to possess a controlled substance, and where more than one substance is involved, the trial court must assume that the conviction is for conspiracy to possess the narcotic that carries the most lenient statutory sentence . . . ." A299 (describing holding of *United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998)). According to the court, however, Morales's case was governed by an exception to this rule: "[W]here a jury also convicts a defendant of offenses that were the object of an alleged conspiracy, it is reasonable to conclude that the jury found the defendant guilty of conspiracy to commit that substantive offense." A300. Here, because the jury convicted Morales on a charge of possession of cocaine base, the court "reasonably inferred that the jury convicted Morales for conspiracy to possess cocaine base despite the absence of a special verdict on that count." A300. Accordingly, the court rejected Morales's contention that his appellate lawyer was constitutionally deficient in failing to argue for a corrected sentence on the drug conspiracy count. A300.

B. Governing law and standard of review

See Parts I.B.2. and 1.B.3., *supra*.

C. Discussion

1. Counsel's failure to raise a questionable sentencing claim in a multi-defendant appeal that already raised multiple issues did not demonstrate objectively deficient performance.

Morales has failed to show that his lawyer provided constitutionally deficient assistance on appeal by failing to raise one issue of questionable merit. Morales's lawyer raised multiple issues on appeal, and applying the "strong presumption that [his] conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, he should not be faulted for failing to raise one likely meritless argument.[7] *See United States v. Regalado*, 518 F.3d 143, 149 n.3 (2d Cir. 2008) (The "failure to make a meritless argument does not amount to ineffective assistance.") (quotation omitted)). Indeed, even if the argument were not frivolous, his lawyer should not be faulted for failing to add the argument to an already lengthy appellate brief. *Mayo*, 13 F.3d at 533 (noting that "counsel does not have a duty to advance every nonfrivolous argument that could be made").

The argument Morales claims his lawyer should have raised was questionable at best. It rests on *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984) and *United*

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[7] Although Morales bears the burden on this issue, he has not submitted any affidavits or other evidence to explain his lawyer's failure to raise this issue in his brief.

States v. Barnes, 158 F.3d 662 (2d Cir. 1998). In *Orozco-Prada*, the defendant was charged with a conspiracy to distribute and to possess with the intent to distribute controlled substances in violation of 21 U.S.C. § 841(b)(1)(A) and § 841(b)(1)(B). The jury returned a general verdict of guilty, and the defendant was sentenced to eight years' imprisonment based on the penalties found in § 841(b)(1)(A) for cocaine conspiracies. On appeal, this Court found that his sentence was improper because in the absence of a special verdict, there was no way to know whether the jury convicted the defendant of a cocaine-related conspiracy, thus exposing the defendant to a maximum fifteen year sentence under § 841(b)(1)(A), or a marijuana-related conspiracy, exposing the defendant to a maximum five-year sentence under § 841(b)(1)(B). 732 F.2d at 1083. This Court withheld its judgment on the drug conspiracy count for 30 days to allow the Government to decide whether to resentence the defendant under § 841(b)(1)(B) or to retry him on the drug conspiracy count. 732 F.2d at 1084.

This Court applied *Orozco-Prada* in *Barnes*, an appeal from a conviction by one of Morales's co-defendants. There, the defendant was convicted of the drug conspiracy count (Count 27) that charged him with conspiring to possess with the intent to distribute marijuana, heroin, cocaine, and cocaine base. 158 F.3d at 666-67. Although the jury did not return a special verdict, Barnes was sentenced to a twenty-year mandatory minimum term that was calculated based on the district court's finding that he conspired to distribute 50 grams or more of cocaine base and that he had a prior felony drug conviction. *See* 21

U.S.C. § 841(b)(1)(A). This Court found that the sentence was improper and held that the applicable statutory penalty resulting from the general verdict should have been determined as if the offense of conviction were for the type of controlled substance that was subject to the lowest statutory penalty *and* for which there was sufficient evidence in the record to support the jury's general verdict.[8] 158 F.3d at 667-68.

Based on these cases, Morales contends that his lawyer provided ineffective assistance by failing to challenge his sentence on the drug conspiracy on appeal. But Morales's lawyer could wisely have chosen to forgo raising this issue because those decisions are distinguishable. In both cases, the defendants were charged and convicted on a drug conspiracy count but faced no other drug charges. *Orozco-Prada*, 732 F.2d at 1079, 1084; *Barnes*, 158 F.3d at 664. Morales, by contrast, was convicted not only on a drug conspiracy count but also on a drug possession count, namely, with the possession with the intent to distribute 50 or more grams of cocaine base. A42. From this conviction, the district court could have reasonably concluded that the

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[8] This last condition was relevant in *Barnes* because the Court found that in light of the record evidence "it is inconceivable that the jury could have convicted the defendant of conspiracy to possess marijuana." 158 F.3d at 668. Here, although the defendant does not demonstrate that there was sufficient evidence to support a conviction for conspiracy to distribute marijuana, the Government assumes for the sake of this appeal that the record would support such a finding.

jury found Morales guilty of conspiracy to distribute cocaine base and sentenced him accordingly.

Indeed this Court made that very point in *Orozco-Prada*. There, this Court distinguished *United States v. Peters*, 617 F.2d 503 (7th Cir. 1980) (per curiam) by noting that in that case, even though "'several of the substantive offenses underlying the conspiracy charged [had] maximum sentences of less than 15 years,'" the defendant's fifteen-year sentence for a drug conspiracy conviction was proper because the "defendant was also convicted of substantive drug offenses carrying fifteen-year sentences." 732 F.2d at 1084 (quoting *Peters*, 617 F.2d at 502). There, the Seventh Circuit had concluded that "'since the jury convicted defendant of the offenses . . . that were the objects of the alleged conspiracy, it is reasonable to conclude that the jury found defendant guilty of a conspiracy to commit [those] substantive offenses.'" *Id.* (quoting *Peters*, 617 F.2d at 506).

Here, just as in *Peters*, although at least one of the substantive offenses underlying the conspiracy charged had a maximum sentence of less than life imprisonment, Morales was also convicted of a substantive drug offense that carried a maximum penalty of life imprisonment. *Orozco-Prada* expressly distinguished this fact pattern and accordingly, under that decision, Morales's sentence was proper.

In this appeal, Morales argues that the *Peters* "exception" to *Orozco-Prada* should not hold and therefore that Morales's conviction on the substantive drug

count could not have been considered when determining his sentence on the drug conspiracy count. Appellant's Brief at 50-52. In support, he cites this Court's decision in *United States v. Zillgitt*, 286 F.3d 128, 136 n.6 (2d Cir. 2002), issued subsequent to Morales's appeal, in which this Court noted the *Peters* decision and declined to decide whether it would apply in that case because it was inapposite on the facts. But even if the *Peters* exception to *Orozco-Prada* was still open to reconsideration at the time Morales filed his appeal, that fact does not establish that Morales's lawyer performed in an objectively unreasonable manner by failing to raise the issue on appeal. *At best*, Morales has shown that when his appeal was perfected, there was some slight ambiguity in the proper application of *Orozco-Prada* to cases such as his involving defendants who were convicted on both general drug conspiracy charges *and* substantive drug offenses. In light of this ambiguity, and in light of this Court's suggestion in *Orozco-Prada* that claims by defendants such as Morales would not be successful, an effective appellate lawyer could reasonably have chosen to forego raising the issue.

An effective appellate advocate must choose which issues to present, ever mindful of the need to focus the Court's attention on a handful of strong issues and avoid hiding those issues in a flurry of weaker claims. *See Jones*, 463 U.S. at 751-52. Here, Morales's lawyer raised multiple issues to challenge his conviction and sentence, including, *inter alia*, challenges to jury selection, challenges on evidentiary rulings, challenges on the denial of his motion for severance, and claims of insufficiency of

the evidence on multiple charges. With this broad array of issues, Morales's lawyer should not be faulted for failing to raise one additional issue, especially when it was far from clear that that issue was meritorious. Moreover, a reasonable lawyer could certainly have chosen to forego a challenge to Morales's life sentence on the drug conspiracy count when, because of Morales's five other life sentences, it would have had no impact on Morales's total sentence.

2. Morales suffered no prejudice from counsel's failure to challenge his life sentence on the drug conspiracy count.

Even if Morales could show that his lawyer provided objectively unreasonable performance by failing to challenge his life sentence on the drug conspiracy count on appeal, his ineffective assistance of counsel claim would fail on prong two: he cannot show that he was prejudiced by this failure. *Strickland*, 466 U.S. at 687.

Because Morales's trial lawyer never objected to the life sentence imposed on the drug conspiracy count, his claim would have been reviewable on appeal for plain error under Rule 52(b). *See Johnson*, 520 U.S. at 466-67; *Cotton*, 535 U.S. at 631-32.

Morales's claim would not have met the standards of plain error review. Even if Morales's lawyer had raised the issue on appeal, Morales would still have faced five other concurrent life sentences. Because his total effective sentence would remain unchanged, any hypothetical error

could not have affected his substantial rights. Accordingly, he would not have been able to satisfy the third or fourth prongs of plain-error analysis, and raising the issue would have been futile.

This case is on all fours with *United States v. Rivera*, 282 F.3d 74 (2d Cir. 2000) (per curiam). In that case, the defendant had been convicted and sentenced to life imprisonment on three counts, including (1) illegally possessing drugs, 21 U.S.C. § 841, (2) participating in a continuing criminal enterprise ("CCE"), 21 U.S.C. § 848, and (3) possessing a firearm in connection with a drug offense, 18 U.S.C. § 924(c). The defendant challenged his sentence on the grounds that the district court's findings about the quantity of drugs involved in the narcotics offense violated the Sixth Amendment, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court rejected this contention, because the statutory maximum on the CCE count was life in prison, and so any judicial factfinding had not increased the maximum punishment to which the defendant was exposed. 282 F.3d at 76-77. The Court also rejected any claimed defects in the sentences on the drug and gun counts as "certainly harmless." *Id.* at 77. "Because [the defendant] could properly be sentenced to life imprisonment on the CCE count, a concurrent sentence on other counts is irrelevant to the time he will serve in prison, and we can think of no collateral consequences from such erroneous concurrent sentences that would justify vacating them." *Id.* at 77-78.

Since *Rivera* was decided, this Court has reiterated the principle that "an erroneous sentence on one count of a

multiple-count conviction does not affect substantial rights where the total term of imprisonment remains unaffected . . . ." *United States v. Outen*, 286 F.3d 622, 640 (2d Cir. 2002). Moreover, the Court enforced the rule in *Outen* even though that case involved an error that was at least nominally more serious than the one presented here. In *Outen*, the defendant had been convicted of two drug possession counts and one drug conspiracy count. The district court sentenced him to 60 months for each of the possession counts and 110 months for the conspiracy count. *Id.* at 639. The Court concluded that the conspiracy count carried a 60-month statutory maximum, and that the 110-month sentence therefore violated the Sixth Amendment. Nevertheless, resentencing was not warranted because his sentences would have been stacked to achieve the same overall punishment. *Id.* at 639-40. *See also United States v. McLean*, 287 F.3d 127, 135-37 (2d Cir. 2002) (declining to remand or modify judgment where defendant failed to preserve *Apprendi* claim that sentence on each individual count exceed statutory maximum, because total effective sentence could have been imposed by running shorter sentences on each count consecutively).

Most recently, this Court applied these principles in *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 252 (2008), where it decided not to grant a *Crosby* remand on several counts of conviction because the defendants faced a valid life sentence pursuant to 21 U.S.C. § 848. *See* 511 F.3d at 323 n.24 (applying plain-error analysis). "[A]ny resentencing on those counts would not change the fact that defendants

will spend the rest of their lives imprisoned" on the remaining count. *Id.* The result in *Quinones* followed *a fortiori* from cases like *Outen*. In *Outen*, the Court affirmed notwithstanding an error that indisputably increased the sentence on one count of conviction. In *Quinones*, the Court affirmed notwithstanding a different error (mandatory application of the guidelines) which may or may not have had an impact on the sentence for a count of conviction. Here, the defendant's case is weaker still, because he can point only to a possible error (the district court *may* have sentenced the defendant based on a drug conspiracy not found by the jury), with only a possible impact on one count of conviction.

In light of the unbroken line of cases from *Rivera* through *Outen* and *Quinones*, Morales would not have been able to satisfy all the requisites of plain-error review. Accordingly, he suffered no prejudice from his lawyer's failure to raise the issue on appeal.

CONCLUSION

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

Dated: January 28, 2009

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,988 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

ADDENDUM

Sixth Amendment

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

ANTI-VIRUS CERTIFICATION

Case Name: Morales v. U.S.

Docket Number: 04-0858-pr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 1/28/2009) and found to be VIRUS FREE.

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Law Office of Brian Sheppard
516 N. 9th Place, 2nd Floor
New Hyde Park, NY 11040

Attorney for Petitioner-Appellant

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January 28, 2009

JACQUELINE GORDON
Notary Public, State of New York
No. 01GO6149165
Qualified in Kings County
Commission Expires July 3, 2010

Marco Campbell
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949