07-0481-pr(L)

To Be Argued By:
DAVID T. HUANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-0481-pr(L)
07-0513-pr(CON), 07-0514(XAP)

MARKOS PAPPAS,
Petitioner- Appellant,

GORDON LAURIA,
Defendant-Appellant-Cross-Appellee,

-vs-

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant.

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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Statement of jurisdiction

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction over this post-conviction proceeding under 28 U.S.C. § 2255. On December 13, 2006, the court denied Pappas's motion and granted in part and denied in part Lauria's motion. Appendix ("A") 308, 370.[1] On December 20, 2006, the Government moved to reconsider the court's order insofar as it granted Lauria's motion. The Defendants also filed a motion for reconsideration. The court granted the Government's motion and denied the Defendants' motion on April 5, 2007. It granted a certificate of appealability on "the issues presented in these motions [i.e., Government's motion for reconsideration and Petitioners' motion for reconsideration] and in the December 13, 2006 Ruling." Pappas timely filed a notice of appeal pursuant to Fed. R. App. P. 4(a) on February 1, 2007. Lauria and the Government filed timely notices of appeal on February 9, 2007.

This Court has appellate jurisdiction under 28 U.S.C. § 2253.

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[1] "GA__," "A__," and "JA__" refer to the Government's, Pappas's, and Lauria's Appendices, respectively.

Statement of issues presented for review

Lauria's Appeal

I. Whether Lauria procedurally defaulted on his claim that the omission of drug quantity from the narcotics conspiracy charge constitutes a structural error that rendered the superseding indictment fundamentally defective. Despite the fact that Lauria did not raise this claim to the trial court or on direct appeal, can he demonstrate cause and prejudice to excuse the default?

II. Whether Lauria procedurally defaulted on his jurisdictional challenge to his convictions for witness retaliation when he does not identify the error and did not raise the claim on direct appeal.

III. Whether this Court's prior rejection of Pappas's *Brady* claim on direct appeal bars relitigation by Lauria of the same claim in this appeal when Lauria joined in Pappas's direct appeal.

IV. Ineffective assistance of counsel claims.

A. Whether Lauria was deprived of the effective assistance of counsel when trial counsel did not seek unspecified information regarding another criminal case where this Court already rejected the substance of this claim on direct review and found overwhelming evidence of Lauria's guilt.

B. Whether Lauria was deprived of the effective assistance of counsel when trial counsel did not call a witness to rebut the Government's evidence on the Defendants' use of video surveillance equipment when that proffered testimony would not have contradicted the evidence that the Defendants used the equipment in furtherance of the charged narcotics conspiracy.

C. Whether Lauria's appellate counsel were ineffective for failing to raise a Speedy Trial Act violation on the retaliation counts when any error was harmless and the dismissal would have been without prejudice given Lauria's repeated motions to continue jury selection.

D. Whether Lauria was deprived of the effective assistance of appellate counsel when counsel did not challenge the alleged closure of the courtroom during jury selection, when no one objected to any closure after the potential jurors were brought into the courtroom and at least one individual, Lauria's private investigator, was able to witness at least some portion of jury selection. Even if there were a closure, whether it was trivial when at least 116 people were present in the courtroom at the start of jury selection.

V. Whether the court abused its discretion in granting the Government's motion to reconsider its partial grant of Lauria's § 2255 motion where the court

overlooked controlling decisions and matters in its initial decision.

Pappas's Appeal

VI. Whether Pappas procedurally defaulted on his Commerce Clause challenges to his convictions.

VII. Whether Pappas procedurally defaulted on his claim that the case agent committed perjury before the grand jury when he mistakenly testified that Pappas was present during a witness retaliation incident even though the misstatement never formed the basis for a charge and was not introduced at trial.

VIII. Whether Pappas procedurally defaulted on his claim that he is actually innocent of conspiring to distribute the quantity and type of drugs found at sentencing when this argument merely asserts an *Apprendi* challenge and there is overwhelming evidence of both drug quantity and type.

IX. Whether Pappas's constructive amendment claims based on the drug type and quantity should be considered when this Court already rejected this argument on direct appeal. In any case, whether this claim is procedurally defaulted or barred under *Teague*.

X. Whether the case agent gave intentionally false testimony at trial about the absence of Lauria's

fingerprints on certain evidence when there is no evidence that the case agent was aware of an alleged police report cited by Pappas and where the case agent's testimony was consistent with the uncontroverted testimony at trial.

XI. Ineffective assistance of counsel claims.

A. Whether Pappas was deprived of the effective assistance of counsel when trial counsel briefly represented the co-defendant of a Government witness at trial in another criminal matter fifteen months before representing Pappas and there is no indication that Pappas's trial counsel was even aware of his former client's fate at the time of Pappas's trial.

B. Whether Pappas was deprived of the effective assistance of counsel for the alleged lack of trial preparation where the district court's factual findings that trial counsel met with Pappas multiple times and discussed trial strategy with him were not clearly erroneous.

C. Whether Pappas's trial counsel was ineffective for failing to call his ex-fiancee to testify about the reasons why Pappas assaulted a Government witness when she did not witness the assault.

D. Whether Pappas was deprived of the effective assistance of counsel when trial counsel allegedly disregarded his desire to testify when the court

credited his trial counsel's affidavit that he and Pappas made that decision together.

XII. Whether Pappas's *Apprendi* claim challenging his sentence is procedurally defaulted.

XIII. Whether Pappas's discovery claim merely reiterates his ineffective assistance claims.

XIV. Whether Pappas's claim that the trial judge should have recused himself is procedurally defaulted or, in any case, premised on pure speculation.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-0481-pr(L)
07-0513-pr(CON), 07-0514(XAP)

MARKOS PAPPAS,
Petitioner- Appellant,

GORDON LAURIA,
Defendant-Appellant-Cross-Appellee,

-vs-

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

After a six-day trial in 1998, Petitioners Gordon Lauria and Markos Pappas were each convicted of conspiracy to possess with intent to distribute cocaine, conspiracy to commit witness retaliation, and a substantive count of witness retaliation. Lauria was convicted of an additional substantive count of witness retaliation. Judge Dorsey

sentenced Lauria to 35 years in prison and Pappas to 30 years in prison. They now appeal the district court's denial of their motions to vacate their convictions under 28 U.S.C. § 2255.

Lauria, who is represented by counsel, and Pappas, who is *pro se*, each raise numerous claims, none of which merits habeas relief.[2] As discussed below, the majority of the claims are procedurally defaulted. For the sake of clarity, the Government's brief addresses each Defendant's claims as they are presented in their briefs.

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[2] Pappas joins in the arguments of Lauria to the extent applicable. Unless otherwise noted, the Government's discussion of Lauria's claims applies equally to Pappas's joinder of those claims.

Statement of the Case

On April 3, 1997, a federal grand jury in New Haven returned a superseding indictment charging the Defendants-Appellants Gordon Lauria and Markos Pappas and Defendant Alexander Rogers in a four-count indictment. Count One charged all Defendants with conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. § 846. Count Two charged Lauria and Pappas with conspiring to retaliate against a witness, in violation of 18 U.S.C. § 371. Count Three charged Lauria and Pappas with retaliation against a Government witness, Ronald Fassett, in violation of 18 U.S.C. §§ 1513(b)(2) and 2, while Count Four charged Lauria alone for retaliation against Fassett. A38-42. On July 29, 1997, after a six-day trial, the jury found the Defendants guilty on all counts. GA4-9.

On March 31, 1998, the district court (Peter C. Dorsey, J.) sentenced Pappas to 360 months on Count One, 60 months on Count Two, and 120 months on Count Three, all to run concurrently. A43. The same day, the court sentenced Lauria to 420 months on Count One, 60 months on Count Two, and 120 months each on Counts Three and Four, all to run concurrently. GA10. This Court affirmed Pappas's and Lauria's convictions and sentences on appeal. *United States v. Pappas*, No. 98-1206, 1999 F.3d 1324, 1999 WL 980957 (2d Cir. Oct. 19, 1999), *cert. denied*, 531 U.S. 854 (Oct. 2, 2000); *United States v. Lauria*, No. 98-1214, 1999 F.3d 1324, 1999 WL 1012819 (2d Cir. Oct. 19, 1999), *cert. denied*, 531 U.S. 869 (Oct. 2, 2000).

Lauria and Pappas filed timely motions to vacate under 28 U.S.C. § 2255 on October 1 and 2, 2001, respectively. After ordering supplemental briefs and affidavits on certain issues, the court on December 13, 2006, denied Pappas's motion, and granted in part and denied in part Lauria's motion. A308, A370. On December 20, 2006, the Government moved to reconsider the court's order insofar as it granted Lauria's motion. GA12. The court granted the Government's motion for reconsideration on April 5, 2007, and granted a certificate of appealability on "the issues presented in these motions and in the December 13, 2006 Ruling." JA58. Pappas filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a) on February 1, 2007. A371-72. Lauria and the Government filed timely notices of appeal on February 9, 2007. GA13-16.[3]

The Defendants are currently serving the sentences imposed.

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[3] The Government appealed the district court's partial grant of Lauria's § 2255 motion. GA15-16. Because the court later granted the Government's motion to reconsider and denied Lauria's petition in its entirety, there is no pending cross-appeal before this Court.

Statement of Facts

From 1994 through 1996, Gordon Lauria, Markos Pappas, and others participated in a conspiracy to distribute cocaine in New Haven.

In July 1995, New Haven Police Officer Karen Hale was investigating possible narcotics trafficking activity at 94 Foster Street that she had noticed while on daily patrol. Trial Tr. 7/21/97 at 157, 159, 255. She saw Ronald Fassett frequently arriving at and leaving that address. *Id.* at 158-59, 241-45, 248, 260. As a result of this and other investigative efforts, Officer Hale applied for a search warrant for that address, which was executed on July 26, 1995. *Id.* at 159-60, 163.

The search of 94 Foster Street uncovered almost 500 grams of cocaine base, 6.5 grams of powder cocaine, pans and plates with cocaine residue, scales, glassine bags, cutting agents, and other drug paraphernalia. *Id.* at 168-69, 171-73, 175-77, 180-83, 200-01. Officers also found handwritten notes that listed names, prices in hundreds of dollars, measurements in grams and half-grams, the term "cookies" (a street term for crack cocaine), and "rerock," (a street term for reprocessing cocaine). *Id.* at 192-95. The police also recovered several documents identifying the occupants of the apartment as Ronald and Charles Fassett and Markos Pappas. *Id.* at 195-99. One of the documents was a telephone bill receipt for the apartment in Pappas's name. *Id.* at 197-99. In fact, Hale stopped and detained Pappas and Fassett en route to executing the warrant as Pappas was driving away from 94 Foster Street

in a vehicle she had previously seen at the address. *Id.* at 164-66.

Fassett had been living at 94 Foster Street for approximately two months before the July 1995 search. Trial Tr. 7/21/97B at 7. He became involved with cocaine trafficking with Raul Luciano from 1994 through January 1995, when Luciano became unable to supply cocaine because of a shortage. *Id.* at 10. Fassett had other sources of income during this time, including Gordon Lauria, and began to rely increasingly on Lauria as a supplier. *Id.* at 11-12, 240.

Fassett obtained drugs from Lauria by paging him and, when Lauria called back, Lauria would direct Fassett where to meet him and whom to see. *Id.* at 7, 240. In early 1995, Fassett was obtaining 125 grams of cocaine from Lauria every week or two. *Id.* Fassett would pick up narcotics from Lauria at, among other places, a third-floor apartment above Nancy's Café on Farren Avenue in New Haven. Trial Tr. 7/22/97 at 4, 5, 7, 239. Alexander Rogers, a bartender at Nancy's Café, was often present and handed Fassett the drugs. *Id.*

In addition to Rogers and Lauria, Pappas and others used the apartment above Nancy's Café for narcotics activity. *Id.* at 123, 243. Lauria, Pappas, and Fassett would "rerock," or cut, cocaine in the apartment above Nancy's Café or at the Fassetts' apartment at 94 Foster Street. *Id.* at 18-22, 35-36, 123, 126, 243; Trial Tr. 7/23/97 at 120, 160-61. Lauria and Steven Laguna also cooked crack (i.e., converted powder cocaine into crack

cocaine) at 94 Foster Street from cocaine obtained from Lauria. Trial Tr. 7/22/97 at 22-24, 28-30, 33; 7/24/97 at 189, 192.

Pappas and Fassett started distributing narcotics together in September or October 1994. Trial Tr. 7/22/97 at 14-15. During this time, Pappas and Fassett were best friends and spent a great deal of time together. *Id.* at 93. By the early summer of 1995, Pappas would obtain an ounce or two from Fassett at a time, sell it, and pay Fassett afterward; that cocaine was supplied by Lauria. *Id.* at 14-16. Fassett and Pappas also obtained narcotics from Lauria together on credit. *Id.* at 17. Fassett and Pappas distributed the crack in amounts of 8 grams and in smaller amounts, with the latter distributed by three to four individuals on the street, whom they recruited together. *Id.* at 25-27, 225. Fassett and Pappas also distributed larger, wholesale amounts of powder cocaine, from 3.5 grams and higher. *Id.* at 25, 27.

As part of this conspiracy, its members would obtain large amounts of powder cocaine from their sources. Fassett traveled to New York with Lauria and Pappas to obtain a kilogram of cocaine from Lauria's source. *Id.* at 38-41. In July 1996, Pappas traveled to Florida to visit Albert "Chicky"Bellucci, an associate of Lauria's, to scout for new sources of cocaine. Trial Tr. 7/23/97 at 88-89. On another occasion, Pappas and Bellucci went to New York to purchase a kilogram of cocaine. *Id.* at 156, 159.

Fassett was arrested on September 28, 1995, on federal charges. Trial Tr. 7/22/97 at 162, 195.[4] After his arrest, he was debriefed in December 1995 by federal authorities regarding his involvement in narcotics trafficking. *Id*. at 83, 163. Thereafter, Fassett was released on bond, and in March 1996, pled guilty to federal narcotics trafficking charges for his involvement in the *Luciano* conspiracy, and entered into a cooperation agreement with federal law enforcement authorities. *Id.* at 71, 83, 85-87, 161, 163, 249-50.

In March 1996, after Fassett pled guilty, Lauria and Pappas visited Fassett and told him that people in New Haven were talking about him being a "snitch." *Id.* at 89. In July 1996, Fassett heard a rumor that Pappas had been calling him a snitch. *Id.* at 101. He confronted Pappas, who denied making those statements and offered to talk to the person who had told Fassett the rumor. *Id.* at 101-05. On the way to talking to the source, however, Pappas suddenly begged off. *Id.* at 106.

In September 1996, while Fassett was still cooperating with federal authorities, Pappas and Lauria visited Fassett's home late at night. *Id.* at 106-07, 165. Pappas

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[4] Fassett knew only a few of the people charged in the 1995 indictment that charged him with drug trafficking, which included Raul Luciano. Trial Tr. 7/22/97 at 140-42. At the time he became involved with Lauria, Fassett was no longer involved in the *Luciano* conspiracy, *id.* at 143. After May 1995, Fassett recalled that he did not deal with anyone other than Lauria. *Id.* at 145.

confronted Fassett, said he wanted to talk to him, and invited him to take a ride with Lauria and several others. *Id.* at 107-08, 110. When Fassett refused, Pappas hit him in the face. *Id.* at 111-12, 113.

A week later, Lauria and Bellucci saw Fassett at a gas station and began chasing him in their car. Lauria drove right up to Fassett's bumper and kept gesturing to pull over. *Id*. at 130-31. At an intersection, Lauria pulled in front of Fassett's car and cut him off. *Id.* at 132, 170. Bellucci got out of Lauria's car and called Fassett and "snitch" and that they would "take care of it right now." *Id.* Fassett continued driving and, in his rearview mirror, could see Lauria making a slicing motion across his throat with his hand. *Id*. at 132-33. Several times, Lauria drove his car in the breakdown lane next to Fassett's car and attempted to push Fassett's car into oncoming traffic. *Id.* at 132-33; Trial Tr. 7/23/97 at 143, 145, 269-72.

At trial, Fassett and Bellucci testified as cooperating witnesses and described both Lauria's and Pappas's drug trafficking activities and their retaliation against Fassett for cooperating with federal authorities. Other than the incident at the gas station, Fassett and Bellucci had never seen each other before. Trial Tr. 7/23/97 at 145. The Defendants did not testify and called no witnesses. On July 29, 1997, the jury found Pappas and Lauria guilty of all counts in the superseding indictment. GA4-9.

Summary of Argument

Lauria's Appeal

I. Lauria claims that the drug conspiracy count in the superseding indictment is fundamentally defective after *Apprendi* because he was not charged with a drug quantity greater than a detectable amount of cocaine. This claim is procedurally defaulted because, as the court properly concluded, it was not raised at trial or on direct appeal. Each of Lauria's arguments to excuse his procedural default fails. First, the Government did not waive its procedural default argument merely because it did not reassert it in a court-ordered supplemental brief when it had raised it in its initial opposition. Second, *Apprendi* was not so novel that its legal basis was not reasonably available to Lauria. Third, any *Apprendi* error was not structural and Lauria must still show "actual prejudice." Fourth, Lauria waived any argument that the ineffective assistance of counsel excuses his procedural default. Finally, even if this Court were to excuse the clear procedural default, this claim fails on the merits because Lauria cannot show that any *Apprendi* error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cotton*, 535 U.S. 625, 632-33 (2002). There was overwhelming evidence that the conspiracy for which Lauria was convicted involved multiple kilograms of cocaine and thus,

any omission of drug quantity from the superseding indictment was not plain error.

II. Lauria's jurisdictional challenge to the witness retaliation counts is procedurally defaulted. Lauria fails to identify the purported jurisdictional error, but in any case, the Supreme Court has rejected the view that indictment defects are jurisdictional.

III. This Court should not address Lauria's *Brady* claim concerning the charging of the *Luciano* case, in which Lauria was not indicted, because this Court has already decided the issue against him when it denied the claim in Pappas's direct appeal, in which Lauria joined. This Court concluded then that any "alleged discrepancy regarding Fassett's dealings with Luciano was of little consequence, as it pertained only to an ancillary matter that did not tend to exonerate or exculpate Pappas." *United States v. Pappas*, No. 98-1206, 1999 F.3d 1324, 1999 WL 980957, at *4 (2d Cir. Oct. 19, 1999). There is no reason to disturb this holding.

IV. None of Lauria's ineffective assistance of counsel claims, asserted against both trial counsel and separate appellate counsel, has merit.

First, Lauria claims that his trial counsel was ineffective for failing to seek evidence relating to the *Luciano* conspiracy that would have bolstered his defense to the drug conspiracy. This Court, however, has already rejected the substance of that

claim in Lauria's and Pappas's direct appeal when it concluded that there was overwhelming evidence against Lauria based on the testimony of several trial witnesses. Lauria's discovery motion for this information fails for the same reason. Nor has Lauria demonstrated good cause to justify discovery into the role, if any, a former police lieutenant may have had in this case.

Second, trial counsel was not constitutionally deficient in failing to call Nancy DeAngelo, the owner of Nancy's Café, to testify. Even fully crediting her proffered testimony that she purchased the video surveillance equipment at 225 Farren Avenue and installed it for legitimate security reasons, it would not have rebutted the Government's evidence that Lauria and Pappas used that surveillance equipment to monitor activity around the apartment above Nancy's Café, a hub of their narcotics operations.

Third, Lauria fails to demonstrate that his appellate counsel was ineffective for not claiming a Speedy Trial Act violation regarding the witness retaliation counts. Any violation would have been subject to harmless error review at the time, and Lauria cannot show that the court would have dismissed the retaliation counts without prejudice, given that Lauria sought and received three continuances of jury selection.

Fourth, Lauria's appellate counsel was not ineffective for failing to argue that the courtroom was closed during jury selection. Given the large number of potential jurors who were going to be in a smaller courtroom, the judge who conducted jury selection (who was not the judge who tried the case) stated that she could not accommodate Pappas's family members. The judge, however, repeatedly invited counsel to raise any concerns after the potential jurors came into the courtroom. The judge never ordered the closure of the courtroom or the sealing of the jury selection transcript. After the potential jurors entered, no one objected to any purported closure. In fact, Lauria's private investigator was able to witness at least some part of jury selection. Even if this Court concludes that the courtroom was closed, any closure was trivial. None of the Sixth Amendment's public trial values was subverted when at least 116 people, including 102 potential jurors, themselves members of the public, were present at the beginning of jury selection. No evidence was presented, no witnesses testified, and no indication exists that the exclusion of spectators affected the integrity of the proceedings in any material way. It was not objectively unreasonable for appellate counsel not to raise this claim. In any case, Lauria has failed to show that any deficiency caused him actual prejudice.

V. The court did not abuse its discretion when it granted the Government's motion to reconsider its

partial grant of Lauria's § 2255 motion, which ordered a resentencing of Lauria based on an alleged *Apprendi* error. The court had the power to reconsider its earlier decision, particularly when the Government merely refocused the court's attention on controlling caselaw it had not fully considered in its initial decision.

Pappas's Appeal

VI. Pappas procedurally defaulted on his Commerce Clause challenges to 21 U.S.C. §§ 841 and 846 and the witness retaliation statute, 18 U.S.C. § 1513. This Court has previously rejected a similar challenge to the narcotics trafficking statutes. Moreover, Pappas cannot demonstrate that Congress exceeded its Article I authority in enacting the witness retaliation statute.

VII. Pappas procedurally defaulted on his claim that the case agent committed perjury before the grand jury. The agent mistakenly testified that Pappas was in Lauria's car when Lauria and Bellucci assaulted Fassett and tried to push Fassett's car into oncoming traffic. In fact, Pappas was not involved in that incident. Pappas did not raise this claim at trial or on appeal and cannot demonstrate cause and prejudice to overcome the procedural bar. Moreover, there is no indication that the misstatement was intentional or was used to support any charge.

VIII. Pappas cannot show that he is "actually innocent" of conspiracy to possess with intent to distribute cocaine base or more than a detectable amount of cocaine, both of which the court found at sentencing, but for which Pappas was not charged in the superseding indictment. To the extent that it is substantive, it is procedurally defaulted. To the extent that this claim is offered to excuse the procedural bar for any other claim, Pappas cannot demonstrate that he is factually innocent given the overwhelming and uncontroverted evidence that Pappas participated in a multi-kilogram conspiracy to distribute cocaine.

IX. The evidence of cocaine base, which was not specifically charged in the drug conspiracy, and drug quantities exceeding a detectable amount, did not constructively amend the superseding indictment. With respect to drug type, this Court has already rejected the claim on direct appeal. Moreover, *Apprendi* does not overcome the relitigation bar because it was not raised on direct appeal and because any reliance on this Court's decision in *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc), on collateral review is procedurally defaulted. In any case, the claim is barred under *Teague v. Lane*, 489 U.S. 288 (1989). With respect to the evidence of drug quantity, this argument is procedurally defaulted and is also barred under *Teague*. Even considering the merits of this claim, Pappas cannot demonstrate that this Court would not follow the result in *United States*

v. Guevara, 298 F.3d 124 (2d Cir. 2002), which overruled an earlier decision that *Apprendi* errors are "akin" to constructive amendments.

X. Pappas argues that the federal case agent committed perjury at trial when he testified that "based on [the Government's] information, it was impossible for fingerprints to be taken" concerning Lauria from the physical evidence seized from the 94 Foster Street apartment. In support of this claim, Pappas tenders an alleged police report that he claims the Government did not disclose below and that states that Lauria's and Pappas's fingerprints were not found on that evidence. This claim fails because there is no evidence that the case agent intentionally gave false testimony. In fact, the agent's trial testimony was consistent with the evidence at trial that Lauria often wore gloves when he was cooking or rerocking cocaine and thus, it would likely have been impossible to recover any fingerprint evidence. Moreover, there is no indication that the case agent was even aware of the police report. In any case, any error was harmless because the absence of the Defendants' fingerprints would not have diminished the substantial evidence against them.

XI. Pappas cannot demonstrate he received ineffective assistance of trial counsel.

First, Pappas's trial counsel, Bruce Koffsky, did not labor under an actual conflict of interest, and the

court did not err in failing to hold a hearing on whether there existed a potential conflict of interest. Koffsky briefly represented a co-defendant of Fassett in the *Luciano* case. His representation was limited in scope and ended fifteen months before he was appointed to represent Pappas. Here, Pappas cannot show that Koffsky's former representation adversely affected or prejudiced his representation of Pappas. Furthermore, the court did not abuse its discretion in declining to conduct a hearing on Pappas's vague and speculative claim.

Second, Pappas cannot show that Koffsky's preparation for trial was constitutionally deficient. Based on affidavits submitted by Pappas and Koffsky, the district court's finding that Koffsky discussed the case with Pappas on multiple occasions and reviewed trial strategy with him was not clearly erroneous.

Third, Pappas claims that Koffsky was ineffective for failing to interview his ex-fiancee and call her as a trial witness. Pappas argues that Michelle Consiglio would have testified to the true and non-retaliatory reasons why Pappas assaulted Fassett on September 14, 1996. Pappas does not furnish an affidavit from Consiglio and, in any case, does not allege that she witnessed the altercation.

Fourth, Pappas cannot demonstrate that he received ineffective assistance from Koffsky's alleged disregard of his desire to testify at trial. The court

could properly credit Koffsky's statement in his court-requested affidavit that he discussed with Pappas the decision not to testify. Moreover, Pappas had given a detailed proffer to the Government describing his involvement in the charged conspiracy that would have been highly damaging to his defense had Pappas taken the stand.

XII. The balance of Pappas's claims also lack merit. Pappas's *Apprendi* challenge to his sentence is, like Lauria's *Apprendi* claim, procedurally defaulted. His discovery motion merely reiterates his other claims and his recusal claim is unsubstantiated and speculative.

Argument

Claims raised in Lauria's brief

I. The court correctly concluded that Lauria's structural error challenge to Count One of the superseding indictment is procedurally defaulted.

Lauria first argues that, based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the superseding indictment's omission of the drug type and quantity in Count One was a structural error that rendered the charging document fundamentally defective. The court correctly concluded that this claim was procedurally defaulted and not excused. A315.

A. Because Lauria did not raise this claim on direct appeal, it is procedurally defaulted.

Habeas review is "an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotation marks omitted); *see also Rosario v. United States*, 164 F.3d 729, 732 (2d Cir. 1998) ("A motion under § 2255 is not a substitute for an appeal.") (internal quotation marks omitted). Accordingly, where a habeas petitioner fails to raise a claim at both trial and on direct appeal, he may not pursue that claim in a § 2255 motion unless he can demonstrate "cause" for not raising the claim previously and actual "prejudice" resulting from the default. *Bousley*, 523 U.S. at 622; *Murray v. Carrier*, 477 U.S. 478, 489-90 (1986). Where a claim is procedurally defaulted and not

otherwise excused, this Court need not consider the merits of the claim. *Napoli v. United States*, 45 F.3d 680, 682 (2d Cir. 1995).

Here, Lauria does not dispute that he did not raise an *Apprendi*-based challenge to the indictment at trial or on direct appeal. Lauria raised this claim for the first time in his § 2255 motion and, accordingly, it is procedurally defaulted.[5]

To overcome the procedural default, Lauria asserts that: (1) the Government waived its procedural default argument; (2) an *Apprendi* challenge regarding drug type and quantity was so novel that it was sufficient cause to excuse the procedural default; and (3) the superseding indictment's failure to include drug quantity constitutes a

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[5] Lauria's and Pappas's citation to *Apprendi* in a motion to amend their certiorari petitions to the Supreme Court does not save this claim from default. After the Defendants filed *pro se* petitions for certiorari and while those petitions were pending, the Supreme Court decided *Apprendi*. The Defendants filed a *pro se* joint motion to amend their petitions raising *Apprendi*, but in the context of a separate constructive amendment claim, not as an independent claim. GA17-19. The failure to raise the *Apprendi* claim on direct appeal, regardless of whether it was raised in a certiorari petition, constitutes a procedural default. *See Carrier*, 477 U.S. at 489-90; *Fay v. Noia*, 372 U.S. 391, 435-36 (1963), *overruled in part on other grounds in Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977). *See also* Section I.C, *infra* (explaining that the basis for *Apprendi* was available long before the *Apprendi* decision itself).

structural error for which no showing of cause or prejudice is necessary. Finally, Lauria argues that the ineffective assistance of trial counsel excuses his procedural default. Addressing each of these arguments in turn, none has merit.

B. The Government did not waive its procedural default argument.

As an initial matter, the Government did not waive its procedural bar argument. The sole basis for Lauria's assertion is that the Government did not explicitly reassert this defense in its response to the court's April 16, 2004, order for supplemental briefing on certain issues. A298. While the Government may waive a procedural default argument by failing to assert it, *see Rosario*, 164 F.3d at 732, that is not what happened here. As Lauria acknowledges, the Government *did* raise the procedural bar in its initial response to Lauria's § 2255 motion. GA21-23. That the Government did not reemphasize this argument in its supplemental brief does not vitiate its earlier procedural bar argument. There is no authority requiring the Government to reassert a preserved procedural bar defense in every pleading.

C. An *Apprendi* challenge was not so novel as to excuse the procedural default on direct appeal.

Next, Lauria argues that *Apprendi* was so novel that its legal basis could not have been reasonably available to counsel at the time of direct review and thus can be raised for the first time on collateral review. In *Bousley*, the

Supreme Court observed that such novel rules of law may constitute cause for a procedural default. 523 U.S. at 622. This Court has observed, however, that "[b]efore *Apprendi*, it had been clear for over a century that these jury and proof requirements [i.e., the defendant's right to a jury trial and the government's burden of proof beyond a reasonable doubt] applied to every fact necessary to constitute the crime with which the defendant is charged." *Coleman v. United States*, 329 F.3d 77, 89 (2d Cir. 2003) (internal quotation marks and alterations omitted). Accordingly, there is no reason why Lauria, who was represented on direct appeal, could not have raised an *Apprendi* claim.[6]

D. Any *Apprendi* error was not structural.

Lauria claims that the absence of the drug type and quantity from the superseding indictment is a structural error and, assuming that he has demonstrated "cause" to overcome procedural default, he need not demonstrate

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[6] Lauria's reliance on *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976), is also misplaced. There, this Court held that a substantive change in the federal bribery statute for which defendant was convicted that occurred *after* the conclusion of defendant's direct appeal could be applied retroactively to a § 2255 motion. *See id.* at 665-67. However, *Loschiavo*'s reasoning rests on this Court's discretion to excuse the defendant's procedural default out of due process concerns because there was "no proof whatever of various elements of the crime charged." *Id.* at 666. That is not the case here. *See* Section I.F, *infra*.

"actual prejudice." Neither argument is developed in Lauria's brief but, in any case, both should be rejected.

Lauria does not explain *how* the failure to allege the drug type or quantity in the superseding indictment is a structural error, and this Court has not directly addressed the issue. Recently, however, this Court has not listed an *Apprendi* charging error among the narrow class of recognized structural errors. *See Gibbons v. Savage*, 555 F.3d 112, 119 (2d Cir. 2009). Given the Supreme Court's traditional reluctance to recognize structural errors and its recognition that most constitutional errors can be harmless, there is no reason to recognize an *Apprendi* error as one now. *See Neder v. United States*, 527 U.S. 1, 8 (1999) ("[W]e have found an error to be structural and thus subject to automatic reversal only in a very limited class of cases." (internal quotation marks omitted)); *see also United States v. Cotton*, 535 U.S. 625, 632-33 (2002) (declining to decide whether *Apprendi* charging error can be considered "structural," but noting *Neder*'s holding that *Apprendi* sentencing error is not structural).

E. Lauria has waived the argument that ineffective assistance excuses the default.

Lauria makes a cursory claim that the ineffective assistance of counsel should excuse his failure to raise the *Apprendi*-based challenge to Count One. He makes no showing, however, why counsel's performance was deficient or prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, this Court should consider the argument waived. *See Norton v. Sam's Club*,

145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Here, Lauria merely references arguments he presented to the court and states the issue "without advancing an argument." *Id.* Although this rule is "tempered in *pro se* cases," Lauria is represented by counsel in this appeal. *Id.* at 118 n.1.

Even if Lauria did *not* waive this argument, it should still be rejected as a basis to excuse the default. At the time of trial and direct appeal, this Court had unequivocally held that the amount of narcotics for the purposes of 21 U.S.C. § 841 was not an element of the offense. *See United States v. Campuzano*, 905 F.2d 677, 678-99 (2d Cir. 1990) (rejecting collateral challenge to the failure to allege drug quantity in the indictment), *overruled in United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc). Thus, it was not objectively unreasonable for appellate counsel to conclude at the time that such an argument had little chance of success in light of clear caselaw to the contrary. *See Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001) ("An attorney is not required to forecast changes or advances in the law.") (internal quotation marks omitted).

F. Even if this Court addressed the claim's merits, there was overwhelming evidence of drug type and quantity such that any error did not seriously affect the fairness, integrity, or public reputation of the trial.

Even if Lauria could demonstrate that he could overcome the procedural default, the claim should still be denied because any *Apprendi* error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 632-33. In *Cotton*, the Supreme Court rejected the claim that *Apprendi* formed the basis for a jurisdictional challenge to an indictment that did not charge drug quantity and determined that, for claims not asserted at trial, a plain error standard of review applied. 535 U.S. at 631. For an error to be plain, this Court must conclude that (1) there was error, (2) that is plain, and (3) that affects substantial rights. *Id.* at 631. If all three conditions are met, then the reviewing court may exercise its discretion to notice the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 631-32.

After *Cotton*, *Apprendi* errors in an indictment do not satisfy this last requirement if the evidence of drug quantity was overwhelming and essentially uncontroverted. *Id.* at 633. This is because "[t]he real threat . . . to the fairness, integrity, and public reputation of judicial proceedings would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial

drug offenses because of an error that was never objected to at trial." *Id.* at 634.

Here, even assuming that any error satisfied the first three prerequisites for plain error, the evidence at trial regarding the quantity of the charged drug, cocaine, was overwhelming.[7] Fassett, a cooperating prosecution witness, testified that Lauria and Pappas were involved in a multi-kilogram conspiracy to distribute cocaine. At trial, he testified that, in early 1995, he obtained 125 grams of cocaine from Lauria every week or two. GA26. He also described going on a trip to New York in June or July 1995 with Lauria to purchase a kilogram of cocaine for $23,000 that they brought back to New Haven. GA38-41. On another occasion, on July 25, 1995, Fassett testified that he had planned with Pappas and Lauria that as soon as Lauria had obtained a kilogram of cocaine, Lauria would call Fassett or Pappas and they would pick up a portion of the drugs. GA33-34. Pappas then brought nine ounces of cocaine from Lauria to 94 Foster Street, where Fassett lived. GA36-37. Moreover, in September 1995, Fassett

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[7] In addition to the evidence of a conspiracy to distribute powder cocaine, the Government also presented extensive evidence at trial involving crack cocaine. Although crack cocaine was not a drug type charged in Count One of the superseding indictment, such evidence was relevant at trial to the retaliation charges, which alleged that Fassett was providing information to federal authorities concerning a conspiracy to possess with intent to distribute both cocaine and cocaine base. A39, A41-42.

described "rerocking" two ounces of cocaine into four ounces. GA43-44.

Another Government witness, Albert "Chicky" Bellucci, testified at trial that, in the course of the conspiracy, he traveled with Pappas to New York to purchase a kilogram of cocaine. GA89, 92. Bellucci recounted discussions he had with Pappas about Lauria and Pappas obtaining two kilograms of cocaine from Florida per week because the prices in New York were too high. GA83. Pappas and Bellucci went to Florida to talk to potential sources for cocaine and Pappas said that he would give Bellucci $1,000 for each kilogram he brought back to Connecticut. GA84-85. Bellucci also testified that the day that he was arrested in connection with this investigation, he witnessed Lauria rerock a quarter pound of cocaine. GA93. He also saw William Reyes, a.k.a. "Porky," obtain a quarter pound of cocaine from Lauria shortly before Bellucci's arrest. GA95-96.

Finally, Edward Derenzo testified about obtaining cocaine from Lauria and Pappas. Derenzo would contact Lauria via beeper and purchase fourteen grams of cocaine for $450. GA81. He made four or five of these purchases from Lauria. GA78-79, GA82.

This overwhelming evidence demonstrates that Lauria was engaged in a narcotics conspiracy to distribute more than 500 grams of cocaine, thus exposing him to a maximum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(B) upon the filing of an information under

§ 851, as was done here.[8] Therefore, any error in failing to include the quantity in the superseding indictment does not undermine the integrity of the trial. Here, as in *Cotton*, "the grand jury, having found the conspiracy existed, would have also found that the conspiracy involved at least [500 grams of cocaine]." 535 U.S. at 633. There was no plain error in the superseding indictment.[9]

II. Lauria procedurally defaulted his jurisdictional challenge to the retaliation counts.

Lauria next alleges that the superseding indictment contains an unspecified "jurisdictional" error with respect to the witness retaliation counts charging violations of 18

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[8] Lauria did not challenge the drug quantity in any relevant way. At sentencing, Lauria's counsel specifically argued that the quantity of powder cocaine the court should find for sentencing purposes should be between 2 to 3.5 kilograms, far in excess of the 500 gram threshold under 21 U.S.C. § 841(b)(1)(B). GA98-99.

[9] To the extent that Lauria's *Apprendi* claim could be construed as a challenge to his sentence, this unpreserved claim also would not have been plain error. Lauria was convicted of multiple counts and his maximum possible sentence of 660 months (based on running the sentences for each count consecutively) far exceeded the 420 months of imprisonment that he actually received. As discussed in greater detail in Section V, *infra*, even if an *Apprendi* error merited a resentencing, the court could have exercised its discretion to order Lauria to serve his sentences consecutively up to 420 months. JA57.

U.S.C. §§ 1513 and 371. He states that the Government failed to allege a "jurisdictional offense element with the requisite degree of specificity." Lauria Br. at 38. Although it is not clear from Lauria's brief, he appears to be referring to the allegations in Claim One of his § 2255 motion that the retaliation counts "do not allege that Ronald Fassett gave information to a law enforcement officer, as that term is defined by the retaliation statute . . . ." Lauria Pet. at 4. Because Lauria did not raise this claim on direct review, the court properly concluded that this claim is procedurally barred. A315.

Lauria maintains that this indictment defect is "jurisdictional" and therefore he does not need to overcome the procedural bar. Even assuming that the superseding indictment omitted an element, the Supreme Court "some time ago departed from . . . [the] view that indictment defects are 'jurisdictional.'" *Cotton*, 535 U.S. at 631 (overruling the "elastic concept of jurisdiction" expressed in *Ex parte Bain*, 121 U.S. 1 (1887)). Because Lauria fails to demonstrate cause and actual prejudice to excuse the default and because he does argue the merits of the claim, the claim should be rejected.

III. This Court has already rejected Lauria's *Brady* claim on direct appeal and therefore he is barred from relitigating it.

Lauria's claim that the Government withheld material exculpatory information from him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), should be rejected. Although his brief does not pinpoint what information he

claims was improperly withheld, it appears to relate to the defense theory that the physical evidence seized from 94 Foster Street was part of the *Luciano* conspiracy, a separate criminal case in which Fassett was charged and the Defendants were not. If that is the case, this Court previously considered and addressed the merits of this claim on direct appeal. Accordingly, it should not revisit that decision.[10]

In *Barton v. United States*, 791 F.2d 265 (2d Cir. 1986) (per curiam), this Court declined to revisit a claim raised by the petitioner in a § 2255 motion that was previously considered and rejected on direct appeal. *See id.* at 266-67 ("[S]ection 2255 may not be employed to relitigate questions which were raised and considered on direct appeal."); *see also United States v. Sanin*, 252 F.3d 79, 83 (2d Cir. 2001) (per curiam) (same). In this case, co-defendant Pappas raised the same *Brady* claim before the court and on direct appeal. GA101-05 (labeling the claim as a *Brady* violation). Lauria joined in Pappas's arguments on direct appeal. GA107. On direct review, this Court held:

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[10] To the extent that Lauria's *Brady* claim refers to some other exculpatory material, it is procedurally defaulted, as the court found. A314-15. Lauria advanced no *Brady* claim on direct appeal other than joining Pappas's claim. Although Lauria asserts that the Government "expressly abandoned" its procedural default argument by not reasserting it in its supplemental brief, a review of the Government's initial opposition to Lauria's § 2255 motion and its supplemental brief demonstrates that this assertion is false. GA21-23.

> Pappas claimed that the government knew that Fassett would testify that he stopped dealing drugs with Raul Luciano prior to the summer of 1995, despite the fact that the government had information suggesting that Fassett continued to deal drugs with Luciano in August, 1995. The district court correctly found that the alleged discrepancy regarding Fassett's dealings with Luciano were of little consequence, as it pertained only to an ancillary matter that did not tend to exonerate or exculpate Pappas. Moreover, Fassett's testimony was not the only evidence implicating Pappas. Accordingly, no new trial is warranted because there was no evidence indicating "that the jury probably would have acquitted" absent the perjury. *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992).

Untied States v. Pappas, No. 98-1206, 199 F.3d 1324, 1999 WL 980957, at *4 (2d Cir. Oct. 19, 1999). This Court's decision on the merits, then, forecloses another consideration on Lauria's § 2255 motion.[11]

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[11] The court thoroughly reviewed this claim on the merits before rejecting it. In denying this claim, the court noted that "Pappas and the court have now reviewed [F]assett's plea record" and concluded that there was nothing "directly exculpative of Pappas nor that would have remotely aided Pappas at trial by adding to what could have been used to impeach Fassett." GA109. On collateral review, the court ordered an *in camera* review grand jury minutes before rejecting the § 2255 motion. A245.

(continued...)

IV. Lauria's ineffective assistance of counsel claims

A. Governing law and standard of review

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*, 466 U.S. at 689. The ultimate purpose of the inquiry is not to second-guess decisions made by defense counsel; instead, 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

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[11] (...continued)

To the extent that there was evidence linking Fassett to narcotics trafficking with *Luciano*, it was summarized in the August 3, 1995, and September 1, 1995, Title III affidavits of Special Agent Michael Wardrop, both of which were disclosed to the defendants before trial. JA35-40, GA110-18. Indeed, Lauria's trial counsel's cross-examination of Fassett reveals that he was aware of the pen register data described in the affidavits. GA55-56.

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. *Strickland*, 466 U.S. at 697.

To establish ineffective assistance of appellate counsel, a petitioner must satisfy the same two-part performance and prejudice test announced in *Strickland. 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.*; *Knox v. United States*, 400 F.3d 519, 521 (7th Cir. 2005). Indeed, "[l]awyers 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. *See also Mosby v. Senkowski*, 470 F.3d 515, 524 (2d Cir. 2006) (noting that 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").

"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) (citation and quotation marks omitted). Whether a lawyer's representation is ineffective "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).

B. This Court has already rejected the claim that trial counsel's failure to seek evidence regarding the *Luciano* conspiracy was ineffective assistance.

Lauria first contends that his trial counsel was constitutionally deficient for failing to seek certain evidence relating to the separate *Luciano* conspiracy that he claims would have bolstered his trial defense. He does not specify what additional evidence trial counsel could have or should have sought. Regardless of what that evidence was, Lauria now claims that, but for failing to obtain that "something," the outcome of the trial would have been different. Because this Court has already decided on direct review that no prejudice resulted from failing to present additional evidence concerning the *Luciano* conspiracy, this claim should be rejected.

On direct appeal, Lauria claimed that the court improperly precluded defense counsel from cross-examining Fassett about his role in the *Luciano* conspiracy and specifically about who paid for Lauria's bail in September 1995. *Lauria*, 1999 WL 1012819, at *1. This Court rejected the claim on the merits and observed that there was no error and that, even assuming error, it was harmless because the Government presented "*overwhelming evidence against Lauria*: the government sponsored several witnesses who offered independent evidence of the charged conspiracy and Lauria's involvement in it, as well as records, physical evidence, and the testimony of law enforcement officers." *Id.* (emphasis added). Similarly, and as discussed above, this

Court also rejected on direct appeal Pappas's claim that the court erroneously denied his *Brady* motion. *Pappas*, 1999 WL 980957, at *4; Section III, *supra*. Thus, even if this Court were to assume that Lauria's trial counsel were constitutionally deficient, he has failed to demonstrate that the outcome of the trial would have been any different.[12]

Lauria also makes a related claim that the court improperly denied his request for discovery on the identity of a confidential informant. He alleges that the identity of "CI-9," cited in an application for a wiretap, would have

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[12] Nor has Lauria demonstrated that his trial counsel's actions fell below an objective standard of reasonableness under *Strickland*. As he acknowledges, defense counsel presented a theory at trial that the evidence seized at 94 Foster Street was attributable to the *Luciano* conspiracy instead of to the charged conspiracy against him. As the court properly found below, Lauria's trial counsel extensively cross-examined Ronald Fassett:

> Lauria's counsel cross-examined Ronald Fassett about his involvement with the individuals charged in the Luciano and Ramirez indictments, and tried to develop—through his cross-examination of Fassett—the defense that Fassett had actually been involved in a conspiracy which did not include Lauria or Pappas. Counsel also tried to establish, on cross-examination, that Fassett had actually conspired with the members of the conspiracy with which he had been charged, rather than with Lauria and Pappas.

A321. These factual findings are not clearly erroneous and should not be disturbed.

aided his defense because that person purportedly had information indicating that the evidence seized from 94 Foster Street was attributable to the *Luciano* conspiracy. Once again, this claim was already rejected by this Court on direct review. Defendant Pappas—joined by Lauria—raised this issue in the context of a *Brady* claim, which, as discussed in Section III, *supra*, this Court has already rejected. *See* Pappas Dir. App. Br. at 43, 71.

Similarly, Lauria argues that he should be permitted to conduct discovery into whether former New Haven Police Lieutenant William White had any role in the alleged suppression of purportedly favorable evidence to Lauria. White pled to federal bribery and theft of government fund charges in 2007. Lauria speculates, without any substantiation that his misconduct relates to this case, that White's actions "may have some bearing, and/or shed some light on the suppression" of favorable evidence in this case. Lauria Br. at 76. Such tenuous and unsupported assertions do not satisfy the "good cause" standard under Rule 6(a) of the Rules Governing Section 2255 Proceedings. The court did not abuse its discretion in denying Lauria's motion. *Cf. Drake v. Portuondo*, 321 F.3d 338, 346 (2d Cir. 2003).

C. Trial counsel was not deficient in failing to call Nancy DeAngelo.

Lauria claims that counsel's failure to call Nancy DeAngelo, the owner of Nancy's Café (located downstairs from co-defendant Rogers's apartment), constituted ineffective assistance because she would have rebutted the Government's evidence that the Defendants used the video surveillance equipment in the building in furtherance of the charged drug conspiracy. At trial, Chicky Bellucci, a cooperating witness, testified that Lauria and Pappas used that equipment to monitor activities around Rogers's apartment while conducting narcotics trafficking activity. GA86-88.

The sole reason Lauria argues that DeAngelo's testimony would have been helpful was because she could have told the jury that she (and not a member of the conspiracy) bought the surveillance equipment and installed it for legitimate reasons. JA41-42. This testimony, however, would *not* have "attack[ed] the truthfulness of Bellucci on the integral issue of illicit activity in Rogers' apartment," as Lauria claims. Regardless of *who* installed the surveillance equipment or *why* it was installed, nothing in DeAngelo's proffered testimony would have rebutted Bellucci's testimony that Pappas and Lauria used it in the course of the charged conspiracy. Because the testimony would have been of marginal relevance in light of the overwhelming evidence

of Lauria's guilt, the failure to call DeAngelo was not objectively unreasonable or prejudicial.[13]

D. Lauria has not demonstrated that appellate counsels' failure to assert a Speedy Trial Act claim was unreasonable or prejudicial.

With respect to his appellate counsel, who were different from his trial counsel, Lauria asserts that they were ineffective for failing to raise a Speedy Trial Act claim with respect to the witness retaliation counts on direct appeal. This claim fails both prongs of *Strickland*.

The federal grand jury indicted Lauria and Pappas on October 8, 1996, on the witness retaliation counts. A9 at Docket No. 24. A superseding indictment was returned on April 3, 1997, which included the witness retaliation counts against Lauria and Pappas and added the drug conspiracy count. A10 at Docket No. 58. The speedy trial clock ended on July 21, 1997, when the jury was sworn in. Between the filing of the original indictment and the return of the superseding indictment, Lauria filed three motions to continue jury selection. GA119-25; GA131-32 at Docket Nos. 42, 46, 51. Co-defendant Pappas filed a motion to continue jury selection as well. GA126-28. Each motion was endorsed by the court with no express

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[13] Because Lauria has failed to show that his trial counsel acted unreasonably as to either ineffective assistance claim, his cumulative error claim also fails.

"ends of justice" order or findings on the record.[14] *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985) (requiring court to make prospective, not retroactive, orders excluding time based on ends of justice determination, although the "required findings need not be placed on the record at the same time that the continuance is granted"). If the time permitted for Lauria's continuances were not excluded, more than 70 days elapsed from his first appearance to trial. *See* 18 U.S.C. § 3161(c)(1).

However, Lauria has not demonstrated that it was objectively unreasonable for appellate counsel *not* to raise the Speedy Trial Act claim. First, Lauria may have affirmatively waived any claim under then-existing law by seeking the multiple continuances. *See United States v. Gambino*, 59 F.3d 353, 360-61 (2d Cir. 1995) (recognizing waiver when defendant "lull[s] the court and prosecution

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[14] In rejecting Lauria's pretrial motion to dismiss the retaliation counts based on a Speedy Trial Act violation, the court found that Lauria

> filed multiple motions to continue jury selection and to extend the time for filing of pretrial motions because of the newness of the case, trial schedule of counsel and his interest in considering a plea offer from the government. All of that time for which continuances were granted is excludable because "the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial."

A332.

into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal") (internal quotation marks omitted); *Tunnessen*, 763 F.2d at 79. Even today, such an argument may be judicially estopped. *Zedner v. United States*, 547 U.S. 489, 503-05 (2006) (assuming without deciding applicability of judicial estoppel doctrine to speedy trial claims).

Second, at the time of Lauria's direct appeal, any Speedy Trial Act violations were subject to harmless error review. *See Gambino*, 59 F.3d at 363.[15] Given the district court's initial rejection of Lauria's motion to dismiss the indictment, Lauria's appellate counsel must have been aware that, had they raised the claim on direct appeal and obtained a remand with instructions to dismiss the indictment pursuant to 18 U.S.C. § 3161(a)(2), the court would have almost assuredly dismissed the indictment without prejudice. *Cf. id.* Such a result would have been proper given the statutory factors the court would have considered: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2).

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[15] Nearly seven years after this Court decided Lauria's direct appeal, the Supreme Court in *Zedner* concluded that Speedy Trial Act violations are not subject to harmless error review. *Zedner* does not aid Lauria, however, because "[c]ounsel is not required to forecast changes in the governing law." *Mayo*, 13 F.3d at 533.

Here, the witness retaliation counts were serious crimes of violence and Lauria and Pappas had targeted one of the Government's key witnesses. Moreover, Lauria requested three continuances of jury selection even before the superseding indictment was filed, and each of them was granted. The Government did not request a continuance during that same time. Under these circumstances, dismissal without prejudice would have been the only proper remedy, and the Government would have been able to reindict and try Lauria on the witness retaliation counts. *See Gambino*, 59 F.3d at 363 ("[T]he Government would have been free to seek to have Gambino reindicted . . . . Thus, Gambino's position today would be no better even if the district court had dismissed the superseding indictment.").

E. Lauria cannot demonstrate that appellate counsels' failure to raise the public closure of courtroom during jury selection was ineffective.

Lauria next argues that his *appellate* counsel were ineffective for failing to challenge the district court's alleged closure of the courtroom during jury selection.[16] The record demonstrates, however, that the courtroom was *not* closed because, despite the concerns that some counsel (not Lauria's) expressed before jury selection began, no one made an objection after the potential jurors were brought in. The presence of Lauria's private investigator

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[16] Although Lauria's trial counsel did not object to any alleged closure of the courtroom, he confines his ineffective assistance claim to the conduct of his appellate counsel.

at jury selection only confirms that the courtroom was not closed and that, at most, spectators may only have had standing room to witness jury selection. Moreover, even if there were closure, it was trivial. The Sixth Amendment's public trial values were not subverted here because no witnesses testified and there were well over 100 people in the courtroom. In any case, this claim fails because Lauria cannot demonstrate any prejudice as a result of any closure.

1. Relevant facts

The court conducted the jury selection in this case along with two other cases: one criminal trial and one civil trial. GA153.[17] On the morning of jury selection, *at least* eight counsel and four defendants were in the courtroom in the criminal cases alone and an additional, undisclosed number of counsel and parties were present in the civil case, a section 1983 action. GA215. Before the Defendants and venire panel were brought in, the following colloquy occurred:

> MR. KOFFKSY [counsel for Pappas]:
>
> Your Honor, good morning, Bruce Koffksy for Mr. Pappas. My client has several family members who live in town and who appeared today to not participate but watch the jury selection and I understand that this is one of the smaller courtrooms

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[17] Although the case was assigned to and tried by then-Chief Judge Peter C. Dorsey, Judge Ellen Bree Burns conducted the jury selection. GA133, GA153.

in the building but they have made it very clear to me that they would wish to be present.

THE COURT:

I have been informed of their interest. Unfortunately, it is not a large courtroom and we have a large number of jurors and I'm afraid we can't accommodate them. There's nothing I can do about it.

MR. KOFFKSY:

Would your Honor consider seating some of them –

THE COURT:

The jurors will be seated in the jury box, the panel. We've got so many that I'm sure they are going to be spilling over into the jury box. There just is no way that I could accommodate them or permit them to be that close to the jurors. I wish we could.

You know, I can understand their interest and I think that it's, you know, it's interesting that they have come here for this purpose and I wish we could accommodate them but unfortunately, in this courtroom, there just isn't room.

Why don't we get all the jurors in here and see what the lay of the land is? But I think you are going to find that we cannot bring them in.

MR. KOFFSKY:

Thank you, your Honor.

MR. EINHORN [counsel for co-defendant Alexander Rogers, who is not a party to this appeal, as well as for Mr. Paul, the defendant in the other criminal case picking a jury that day]:

Could we ask your Honor after the panel is narrowed down some and the room is somewhat emptied.

THE COURT:

By that point, your cases will have been disposed of, I think, because I'm going to select the Lauria case first and I presume that's the one that you are interested in and then your case, Mr. Paul, and then I'm going to do the civil case.

And the reason for the order is because we do have cases where I find we frequently lose a lot of jurors who feel they cannot sit on particular kinds of cases such as drug cases. Whether we will have a large attrition as a result of that I don't know but I've got to use the whole panel for that selection.

GA136-37. Lauria and Pappas were brought in shortly after this exchange. Just before the venire was brought in, the following colloquy occurred:

MR. KOFFKSY:

Your Honor, I have informed my client about the fact that he's got family members here and there may be not enough seats for all of them to come into the court and watch jury selection. May I make a request that we at least have one member of each family be allowed to sit in and watch the jury

> selection? Mr. Pappas's mother is here and if Mr. Dorsey [of the U.S. Marshals Service] would allow it, at some place not next to the jury but not in any harm's way, that at least one member of my client's family [sic].[18]
>
> THE COURT:
>
> Mr. Koffsky, you can see the size of this courtroom, you can see the number of attorneys and defendants and parties that we have here. I don't think we are going to be able to accommodate that request.
>
> I suggest we wait until all the jurors are in here and then I think you will see why I have the problem. Even the jury box will be filled with prospective jurors. I don't know where we would put anyone like that. I'm very sorry about that situation but the size of the courtroom is such that I can't accommodate that.

GA141. The potential jurors were then brought into the courtroom at 10:31 a.m. GA142. Although the record does not reflect the physical dimensions of the courtroom, it does reflect that 102 jurors were present. GA152. Thus, including the judge and court reporter, there were, *at a minimum*, 116 people in a "smaller" courtroom at the

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[18] There is no indication from the record whether any member of Lauria's family was present during jury selection or how many of Mr. Pappas's family were present.

beginning of jury selection.[19] Upon seeing all the jurors in the courtroom and "seeing the lay of the land," however, none of the parties objected to any exclusion of any spectators, including family members.

As jury selection progressed, excused jurors were free to leave the courtroom. GA172-73. When the court got to certain questions, individual *voir dire* was held at side bar. GA211-13. At no point in the record did any counsel ask whether spectators could watch the proceedings or otherwise object to the jury selection process. After some, but not all, of the cause and peremptory challenges for the Defendants' trial were completed, GA277, GA297, and before any alternates were selected, the following exchange occurred at sidebar:

> [AUSA] MR. HERNANDEZ:
>
> It appears that a private investigator for the Lauria family, that's what I'm told, is sitting in the second row in the white shirt and he may be chatting up with one of the potential jurors, I don't know. The gentleman with the mustache.

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[19] Since Lauria and Pappas were both detained, this figure does not include the deputy marshals who would have been present. Nor would it have included the counsel and parties from the civil trial or any court security officers or court personnel (such as a courtroom deputies, law clerks, etc.) present. The record reflects the presence of a clerk and two other individuals at some point during jury selection. GA134 (Mr. Ward), GA279 (clerk), GA290 (clerk), and GA295 (Mr. Mastroni).

MR. CHAPNICK [counsel for Lauria]:
Yes, he is an investigator for Lauria.

THE COURT:
Would you please ask him to get up and get out?

[AUSA] MR. CALIFANO:
We would like to ask what he's talked about.

THE COURT:
All right. Do you want to bring him up here?

THE CLERK:
I saw him standing inside the door but I didn't see him talking with anybody. He just sat down.

GA279-80 (emphasis added). The individual was summoned to the sidebar and, after stating his name and confirming that he was a private investigator, a prosecutor asked him the following:

MR. HERNANDEZ:
Did you have an opportunity, were you speaking to one of the potential jurors in the second row, sir?

A:
I just mentioned to him what those people standing up were doing. That's all.

MR. HERNANDEZ:
Which people standing up?

A:

The people standing up, *I left the courtroom and came back*, the people that were standing up, I just mentioned that what were those people.

THE COURT:

You asked the question?

A:

Yeah, I asked what were the people standing, that was it.

MR. HERNANDEZ:

You asked a question of a potential juror what —

A:

I didn't know who the person was. Actually I just asked him, you know, the people standing up, what were they standing up for? I never been into a federal courthouse, that's the only reason why.

MR. HERNANDEZ:

Did the potential juror say anything to you?

A:

No, he just said those are the people that were going for the second round, that were being chosen for the second round.

MR. HERNANDEZ:

Did you say anything else to the potential juror?

A:

No.

MR. CALIFANO:

Did you talk to any of the jurors while you were sitting here? *I noticed you were here earlier.*

A:

No, I didn't talk to anyone. No.

. . . .

MR. CALIFANO:

Did you talk to them, sir.

A:

No, just asked the question, but the lady sitting down, she looked up, said would you like to sit down? I said yes. *I was standing up for a while.* That was it.

GA280-82 (emphases added). After this exchange and some further questions, there is no indication whether the private investigator left the courtroom or remained. Nor is there any indication if there were any other non-juror members of the public in the courtroom.

The court then heard a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), at sidebar. GA285-90. Thereafter, the parties exercised the remaining peremptory challenges and the selection of alternates. GA297. After the jury was selected, the court recessed at 3:05 p.m.

before continuing jury selection in the remaining cases. GA300. There is no dispute that the balance of the Defendants' trial was open to the public. Moreover, the transcript for jury selection was not sealed.

2. Governing law

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." *Id.*

In light of these values, 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 and requires that the court make adequate findings to support the closure. *Rodriguez v. Miller*, 537 F.3d 102, 108 (2d Cir. 2008) (requiring court to consider whether the closure advances an "overriding interest that is likely to be prejudiced," is "no broader than necessary to protect that

interest," and whether there are "reasonable alternatives" to closure).

A violation of a defendant's Sixth Amendment right to a public trial is a "structural" error not subject to harmless error analysis. *Peterson v. Williams*, 85 F.3d 39, 40 (2d Cir. 1996); *Carson v. Fischer*, 421 F.3d 83, 95 (2d Cir. 2005); *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." *Id.* 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 if the court considers the various interests 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*, 555 F.3d at 119-21. A triviality inquiry asks "'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.'" *Carson*, 421 F.3d at 94 (quoting *Peterson*, 85 F.3d at 42).

3. Lauria did not receive ineffective assistance by counsels' failure to raise the closure issue on appeal.

a. The record indicates that the courtroom was *not* closed.

There was no closure during the Defendants' jury selection. At no point did the court order the closure of the courtroom.[20] The court repeatedly expressed its desire to accommodate spectators, but did not think it would be able to seat any of them. GA136. Nevertheless, the court repeatedly invited counsel to raise their concerns *after* the potential jurors were in the courtroom. *Id.* ("Why don't we get all the jurors in here and see what the lay of the land is?"); GA141 ("I suggest we wait until all the jurors are in here and then I think you will see why I have the problem."). After 102 jurors were brought in and at least 116 people were in the small courtroom, the parties engaged in no further discussion, much less objection, regarding any perceived closure. The record is silent as to whether Pappas's family members or anyone else were unable to witness the jury selection; Pappas did not renew

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[20] Although the trial court below concluded that the courtroom was closed during jury selection, JA337, the Government respectfully submits that, under clear error review, this particular finding is entitled to less deference because the trial judge did not conduct the jury selection. Instead, the trial judge reviewed the jury selection transcript to render his decision and thus was in no better position than this Court to determine whether the courtroom was in fact closed.

his suggestion to have one representative from each family sit in. There is no indication, moreover, that anyone was asked to leave, that the courtroom doors were closed or locked, or that spectators were not able to witness jury selection on a standing room basis. *Cf. Peterson*, 85 F.3d at 44 (finding closure where courtroom doors were closed and spectators had been asked to leave).

In fact, at least one member of the public was in the courtroom during jury selection. Lauria's private investigator was able to come inside the courtroom and sit down in the second row. Before he sat down, he had "been standing up for a while." GA282. He was even able to enter the courtroom, leave for some unspecified period of time, and come back. GA280. That statement is buttressed by the prosecutor's statements that he had seen the investigator in court earlier. GA281. Although it is not clear how long the investigator was in the courtroom, he was certainly not barred from the proceedings (at least not until he began talking to a potential juror).

Lauria has the burden of showing that the courtroom was closed and he has failed to do so here. The lack of any objection by counsel after the potential jurors were brought in, coupled with the presence of Lauria's private investigator during jury selection, indicate that the courtroom was not closed.[21]

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[21] Lauria also argues that his appellate counsel did not have the jury selection transcript transcribed. The only support for this claim is an inconclusive affidavit by co-defendant (continued...)

b. To the extent there was any closure, it was trivial.

Should this Court determine that the courtroom was in fact closed, any closure was trivial and thus there was no basis to challenge the closure. Closures can be "sufficiently insignificant [such] that no violation of the Sixth Amendment occurred." *Peterson*, 85 F.3d at 41. To determine whether a closure is trivial, this Court should consider "the values the Supreme Court explained were furthered by the public trial guarantee, focusing on (1) ensuring a fair trial, (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Gibbons*, 555 F.3d at 121. As this Court has observed, the fact that a closure may be unjustified "hardly turn[s] it into an instrument of persecution." *Brown v. Kuhlmann*, 142 F.3d 529, 536 (2d Cir. 1998) (internal quotation marks and alteration omitted). And although this Court has expressed a "heightened interest in the exclusion of [a defendant's] family members," it has nevertheless applied triviality analysis to such closures as well. *Carson*, 421 F.3d at 91, 93-94 (upholding closure where defendant's former

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[21] (...continued)
Pappas in which he states that he (Pappas) did not receive the jury selection transcript until after he filed his appellate brief and that, based on a discussion with Lauria's appellate counsel, Pappas "became aware" that Lauria's counsel did not order the transcript. GA303. Lauria does not include any affidavits by Lauria's appellate counsel or himself to support this argument.

mother-in-law was excluded). Finally, although this Court has recognized that jury selection is a critical stage of criminal proceedings, trivial closures during jury selection do not violate the Sixth Amendment. *Gibbons*, 555 F.3d at 119-21; *but cf. Owens*, 483 F.3d at 66.

The facts in *Gibbons* substantially parallel the circumstances here. There, in a review of a state habeas petition, this Court concluded that a courtroom closure during an entire afternoon of jury selection was trivial. Despite the objection of defense counsel, the trial judge concluded that "because of the small size of the courtroom, the large number of prospective jurors, and the court's desire not to have jurors in close proximity to spectators, closure to spectators was required." 555 F.3d at 114. The *voir dire* that afternoon was closed to the public, including defendant's mother, but after vacant seats in the spectator section of the courtroom became available the next day, the remainder of the trial was open. GA246-47.

After concluding that the closure itself failed to satisfy the requirements of *Waller*, this Court nevertheless concluded that the closure was "too trivial to warrant the remedy of nullifying an otherwise properly conducted state court criminal trial." *Id.* at 121. In addressing the four *Peterson* factors, this Court explained:

> The third and fourth values derived from *Waller* and articulated in *Peterson* are not implicated by voir dire because no witnesses testified. These values, therefore, do not weigh either in favor or against a

> triviality finding. As to the first and second values, in the particular circumstances of this case, limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values. Even if the trial judge had not excluded Gibbons's mother from the courtroom, she would not have been able to watch a significant portion of what occurred during that afternoon session because the private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted in an adjacent room out of the hearing and sight of the other jurors. Further, nothing of significance happened during the part of the session that took place in the courtroom. The judge read the indictment, asked questions of a few jurors, and provided administrative details on what the jurors should expect if chosen. No prospective jurors were excused except with the consent of both parties. No peremptory challenges were made, and no objections were asserted by either party to anything that occurred. The next morning, when voir dire resumed, Gibbons's mother was allowed to watch the proceedings.

Id.

The same reasoning applies to Lauria's claim. Here, no witnesses testified and no evidence was introduced during jury selection. Thus, any closure does not implicate the third and fourth values outlined in *Peterson*. With respect to the first and second values, the exclusion of the public would not preclude a finding here that the jury selection

was fair and that all those present were "keenly alive to a sense of their responsibilit[ies]." *Waller*, 467 U.S. at 46 (internal quotation marks omitted). To the extent that there are any concerns about the effect closure may have had on the conduct of the court, counsel, or the jurors (and Lauria has identified none), they are tempered here by presence of an undisputably large number of potential jurors, itself a cross section of the public. *See Brown*, 142 F.3d at 536-37 (noting that trial "was never completely closed to the public because he was tried before a jury composed of fifteen representatives of the community"). Morever, there is no indication that the court or the parties were concerned about trial publicity or threats or intimidation against anyone involved in the jury selection. Thus, the exclusion of the public would not have affected jury selection in any material way. Finally, significant portions of the jury selection—including certain questioning of potential jurors and the exercise of both for-cause and peremptory challenges—were conducted at sidebar or not done out loud at all. GA211-13, GA248-61, GA263-68, GA274-76, GA277-97, GA299. It is difficult to imagine how the absence of spectators would have affected those portions of jury selection. *See Gibbons*, 555 F.3d at 121. While the parties did exercise written peremptory challenges and the defendants made a *Batson* challenge at sidebar, it is highly doubtful that the additional presence of spectators or family members could have affected the behavior of the judge or counsel when those most affected by those decisions—the Defendants and the potential jurors themselves—were present in the courtroom.

Accordingly, the reasoning in *Owens* is flawed and should not be adopted by this Court. There, in holding that a closure during jury selection was unjustified, the First Circuit observed that potential jurors "might have been more forthcoming about biases and past experiences if they had faced the public [and] that Owens and the Government might have picked a more impartial jury or asked different questions with local citizenry watching." *Owens*, 483 F.3d at 65. At least in the circumstances here, the 102 potential jurors *were* the public; they *were*, by definition, local citizenry. Indeed, the origins of the public trial right stemmed from a recognition that open trials "safeguard against any attempt to employ our courts as instruments of persecution. . . . [and to serve as] an effective restraint on possible abuse of judicial power." *Brown*, 142 F.3d at 535 (internal quotation marks omitted). Jury selection in this case, however, was hardly done in secret, but rather before a large number of potential jurors.

Finally, there is no claim by the Defendants that any other part of their trial was closed. The transcript from the jury selection, as well as from the trial itself, was not sealed. *Press-Enterprise*, 464 U.S. at 512 ("When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time . . . ."). On this record, the public trial values were not subverted and, accordingly, any closure of jury selection was trivial. Thus, Lauria's

appellate counsel were not constitutionally deficient for failing to raise a closure claim.[22]

c. Lauria cannot demonstrate that the failure to raise this claim on direct appeal caused actual prejudice.

Even if Lauria could demonstrate that his appellate counsel unreasonably failed to raise this issue, he cannot show the prejudice prong of *Strickland*, i.e., that "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Purvis*, 451 F.3d at 740 (explaining that, even for structural errors, defendant must demonstrate prejudice for purposes of ineffective assistance). Here, because Lauria did not object to any closure at jury selection, this claim would have been reviewed for plain error on direct review. *See* Section I.F, *supra* (discussing four-part test for plain error review). Even if this Court were to assume, however, that the closure of the courtroom satisfied the first three prongs of plain error review—that there was error, that it was plain, and that the error affected

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[22] Because Lauria has failed to show that he was prejudiced as a result of his appellate counsel's actions, *see* Section IV.E.3.c, *infra*, this Court need not decide whether the courtroom was in fact closed or whether appellate counsel was objectively unreasonable in failing to raise this issue on direct review. Nevertheless, to the extent that this Court determines the record is lacking to make a determination, it may remand for an evidentiary hearing on whether, and to what extent, the courtroom was closed that day. *See Owens*, 483 F.3d at 66.

Lauria's substantial rights—Lauria has not 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 for all the reasons stated in Section IV.E.3.b, *supra*.[23]

V. The court did not abuse its discretion in granting the Government's motion for reconsideration.

With respect to Lauria's final claim, this Court should reject the argument that the court improperly reconsidered its partial grant of Lauria's § 2255 motion. In its initial ruling on Lauria's § 2255 motion, the court concluded that Lauria's appellate counsel was ineffective for failing to raise an *Apprendi* challenge to his sentence of 420 months of imprisonment and, accordingly, partially granted the § 2255 motion to permit resentencing. A346. Upon the Government's motion to reconsider, the court concluded that, pursuant to *Cotton*, the evidence regarding drug quantity was overwhelming and that, in the alternative, the

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[23] Pappas's joinder in this claim fails for an additional reason. On direct appeal, Pappas represented himself and did not raise the courtroom closure claim. Having elected to proceed *pro se* on direct appeal, Pappas cannot now complain that he was ineffective in representing himself. *See United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) (holding that because defendant "proceeded *pro se*, she may not now assign blame for her conviction to standby counsel"); *Gall v. Parker*, 231 F.3d 265, 320 (6th Cir. 2000) (concluding that *pro se* defendant cannot claim ineffective assistance of counsel even though he mounts an inferior quality defense).

stacking provisions of U.S.S.G. § 5G1.2(d) permitted the court to run the sentences for the witness retaliation counts consecutive to the sentence for the drug conspiracy count. JA55-57; *see also United States v. Blount*, 291 F.3d 201, 213-14 (2d Cir. 2002) (rejecting *Apprendi* challenge to sentence where court could run multiple sentences consecutively).

The sole basis for this claim is that the Government merely reiterated its arguments in its opposition and, accordingly, the court abused its discretion in granting the motion. Even if this Court had the power to review a district court's grant of a motion for reconsideration, *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 256 n.1 (2d Cir. 1995), Lauria's argument fails because the court had the *power* to reconsider its previous decisions before the entry of a final judgment. *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (explaining that the law of the case doctrine "does not limit a court's power to reconsider its own decisions prior to final judgment"). Because the court can properly reconsider its earlier decisions if it overlooked controlling decisions or matters, *Shrader*, 70 F.3d at 257, it did not abuse its discretion.

Claims raised in Pappas's brief

VI. There is no merit to the constitutional challenges to the charges in the superseding indictment.

The court correctly concluded that Pappas procedurally defaulted on his Commerce Clause challenges to the

charges for which he was convicted. Pappas did not mount these constitutional challenges at trial or on direct review. Pappas claims, however, that he was excused from raising these claims because 21 U.S.C. §§ 841 and 846 *and* 18 U.S.C. § 1513(b)(2) are unconstitutional both facially and as applied to him and that, therefore, the federal courts have no subject matter jurisdiction over the case.

In addressing a Commerce Clause challenge like the one Pappas advances with respect to 21 U.S.C. §§ 841 and 846, this Court has explicitly upheld the constitutionality of those statutes. *United States v. Genao*, 79 F.3d 1333, 1335-37 (2d Cir. 1996); *United States v. Feliciano*, 223 F.3d 102, 119 (2d Cir. 2000). With respect to Pappas's constitutional challenge to 18 U.S.C. § 1513, that claim suffers from the fundamental misunderstanding that Congress exceeded its constitutional power when it criminalized witness retaliation. Congress passed the Victim and Witness Protection Act of 1982 (of which § 1513 is a part) to, among other things, "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process" and "ensure that the Federal Government does all that is possible within limits to available resources to assist victims and witnesses of crime . . . ." Pub. L. 97-291 § 2 (1982). Plainly, not all federal criminal law derives its authority from the Commerce Clause, as Pappas seems to suggest. *See Sabri v. United States*, 541 U.S. 600, 604-608 (2004) (upholding constitutionality of a federal bribery statute under Article I's spending and necessary and proper clauses). Indeed, under Article I, § 8, Congress has the authority to act to,

among other things, "constitute Tribunals inferior to the supreme Court," "make Rules for the Government," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Here, Pappas has made no showing that the enforcement of § 1513 extends beyond a legitimate government interest cognizable under Article I, § 8, to protect the integrity of proceedings before the Tribunals that Congress is authorized to create. *See Sabri*, 541 U.S. at 605. Accordingly, this claim is procedurally defaulted.

VII. Pappas procedurally defaulted his claim that the case agent committed perjury before the grand jury.

Pappas asserts that Special Agent Kevin Kline, the case agent who summarized the substance of his investigation to the grand jury, intentionally perjured himself when he mistakenly testified that Pappas was in Lauria's car with Lauria and Bellucci during the witness intimidation incident alleged in Count Four of the superseding indictment. Pappas did not raise this claim at trial or on direct appeal and, accordingly, the court concluded that it was procedurally barred. A347.

Recognizing this hurdle, Pappas asserts several unsuccessful arguments to excuse his default. First, Pappas claims that the grand jury minutes that form the basis of this claim were "not part of the record of the case" and thus "could not be raised on direct review." Pappas Br. at 55. Pursuant to its discovery obligations, the Government disclosed before trial the case agent's grand

jury testimony to Pappas's counsel. GA304-05. Thus, Pappas could have raised the claim on direct appeal.

Second, presenting perjured testimony to a grand jury is not a structural error that would excuse the default. Even assuming *arguendo* that the challenged testimony here is perjury, this claim fails. Unlike other structural errors recognized by the Supreme Court, any effect from perjured testimony is "susceptible [to] quantitative assessment to determine its effect, and therefore suitable for harmless error analysis." *United States v. Sitton*, 968 F.2d 947, 954 (9th Cir. 1992) ("Presentation of perjured testimony to the grand jury is not . . . a structural flaw."); *see also United States v. Ciambrone*, 601 F.2d 616, 625 (2d Cir. 1979). Because Pappas was obligated to raise this claim below, he has waived it on collateral review.[24]

In any event, Pappas's claim fails on the merits. There is no indication that the case agent's testimony was intentional. The misstatement by Special Agent Kline was never used to support any charge against Pappas and was never introduced by the Government at trial. Indeed, the absence of any allegation connecting Pappas to the second retaliation incident anywhere else in the investigative reports, statements, and testimony indicate that Special Agent Kline's testimony was inadvertent and immaterial. *See Sitton*, 968 F.2d at 954.

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[24] For the reasons stated in Sections I.B and I.E, *supra*, this Court should also reject Pappas's argument that the Government waived the procedural bar and that ineffective assistance excuses the default.

VIII. Pappas's actual innocence claim is foreclosed and, even if considered as a basis to excuse other procedurally defaulted claims, fails because of the overwhelming evidence of drug quantity.

Next, Pappas tenders that he is actually innocent of the amount and type of drugs the court found at sentencing. It is not clear whether he is asserting this claim in its own right or whether he is asserting it to excuse his procedural default for any other claim. *See Bousley*, 523 U.S. at 623. Regardless of how the Court construes this claim, it lacks any merit. As an independent claim, it is another variation of the *Apprendi* claim that Lauria raised. *See* Section I, *supra*. Like Lauria's claim, Pappas's claim is procedurally defaulted because he did not raise it on direct appeal to this Court. *See* Section I.A, *supra*.

If this Court interprets Pappas's claim as an effort to excuse the procedural default of any other claim, it fails because it is based on a flawed understanding of the actual innocence doctrine. The "actual innocence" exception to a procedural default "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. For the reasons stated in response to Lauria's *Apprendi*-based challenge to the indictment in Section I.F, *supra*, overwhelming evidence established Pappas's guilt of conspiracy involving at least 500 grams of cocaine.

IX. The constructive amendment claim is procedurally defaulted and barred under *Teague*.

Pappas argues that Count One of the superseding indictment was constructively amended to permit a conviction on the basis of a drug type not charged, i.e., cocaine base. He also argues that the drug quantity that the court found at sentencing violates both *Apprendi* and *Thomas* because the jury did not find the quantity necessary to expose him to a higher statutory maximum. A constructive amendment occurs "only when the trial evidence and jury instructions so modify the terms of an indictment that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009) (per curiam) (internal quotation marks omitted).

With respect to the claim that the superseding indictment was constructively amended by the introduction of cocaine base, the court concluded that it is barred because this Court rejected this claim on the merits. A353. On direct appeal, this Court explained: "[T]he indictment was not constructively amended because cocaine base is a type of cocaine, and the indictment charged Pappas with conspiracy to possess cocaine with the intent to distribute. The evidence related to cocaine base was therefore admissible [as] direct evidence of the charged conspiracy." *Pappas*, 199 F.3d 1324, 1999 WL 980957, at *4. Accordingly, this claim should not be revisited on collateral review. *Barton*, 791 F.2d at 266-67.

In response, Pappas argues that *Davis v. United States*, 417 U.S. 333 (1974), permits a claim to be relitigated in a § 2255 motion when there is a change in the law after the direct appeal. *See id.* at 341-43. Pappas relies on *Apprendi* and this Court's *en banc* decision in *Thomas* as the basis to relitigate the drug type claim. The flaw in this argument, however, is two-fold: (1) any reliance on *Apprendi* is procedurally defaulted and not excused, *see* Section I, *supra*; (2) any reliance on *Thomas*, decided after Pappas's conviction became final, is barred under *Teague*. *Thomas* is an explication of *Apprendi* and this Court has held that *Apprendi* is *Teague*-barred for initial § 2255 motions. *Coleman*, 329 F.3d at 82, 90 (concluding that *Apprendi* is not a "watershed" rule and thus not retroactive on collateral review).

As for Pappas's claim that Count One was constructively amended with regard to drug quantity, this claim is procedurally defaulted because Pappas did not raise this argument on direct appeal. Nor does Pappas make any attempt to explain how that default is excused. Even if this Court were to excuse the procedural default, however, it is still barred under *Teague*.

Even though Pappas cannot surmount these procedural hurdles, any consideration on the merits would not change the outcome. Although this Court has not directly addressed whether *Apprendi*-type errors could constitute a constructive amendment of an indictment, it has strongly suggested that they do not. In *Thomas*, this Court observed that a defendant's sentence that exceeded the

statutory maximum for the charge contained in the indictment was "akin to a constructive amendment." 274 F.3d at 671. The Court then explained—without deciding—that such an error, consistent with constructive amendment cases, would be *per se* prejudicial. *Id.* This Court again analogized an *Apprendi* error to a constructive amendment claim in *United States v. Guevara*, 277 F.3d 111, 124 (2d Cir. 2001) (observing that the indictment was "'constructively amended' . . . [i]n charging the jury that drug quantity was not an element of the offense and need not be proven"), *overruled in part on recons. of pet. for reh'g*, 298 F.3d 124 (2002).

After the Supreme Court's decision in *Cotton*, however, this Court vacated the portion of the *Guevara* decision discussed above, notwithstanding its analogy of the *Apprendi* error to a *per se* prejudicial violation. *Guevara*, 298 F.3d at 126-27. Applying *Cotton*'s plain error review to the *Apprendi* error, the *Guevara* court concluded that it lacked the discretion to correct the error because it did not seriously affect the fairness, integrity, or public reputation of the proceedings. *Id.* at 128. Because the reasoning in *Guevara* is dispositive of Pappas's claim here, it should be denied for the reasons stated in Section I.F, *supra*.[25]

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[25] Before the court, Pappas raised the constructive amendment claim at sentencing. GA308-13. Although Pappas's claim would be preserved for purposes of direct appeal and harmless error review would apply, he has not demonstrated that any error affected his substantial rights, since Pappas was not sentenced more than the 30-year statutory (continued...)

X. There is no evidence that Special Agent Kline gave perjured testimony regarding fingerprint evidence.

Relying on an alleged report written by a Detective Chris Grice that Pappas obtained in discovery in unrelated civil litigation, Pappas claims that Special Agent Kline knowingly gave false testimony at trial regarding fingerprint evidence about co-defendant Lauria. That report seems to indicate that Fassett's fingerprints, but not Pappas's and Lauria's, were found during the July 26, 1995, search of 94 Foster Street. A142-44. When asked during cross-examination what information he had about *Lauria*'s fingerprints at 94 Foster Street, Special Agent Kline testified that "[b]ased on our information, it was impossible for fingerprints to be taken." A157.

Pappas did not raise this claim in his § 2255 motion, but rather through a self-styled "letter brief" to the Court dated March 24, 2003. A130-35. Even if this Court considers this belated claim,[26] it should be rejected.

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[25] (...continued)
maximum under 21 U.S.C. § 841(b)(1)(C) upon the filing of a second offender notice. A345.

[26] Pappas claims to have received a copy of the report in or about October 2001. A137. Pappas did not file his "letter brief," however, until approximately fifteen months later, in March 2003. Thus, even if the *pro se* "letter brief" could be construed as a motion to amend Pappas's pending § 2255 motion, it may be time-barred. 28 U.S.C. § 2255 (noting that the one-year statute of limitations runs, *inter alia*, from "the (continued...)

There is no evidence that Special Agent Kline intentionally gave false testimony as to whether it was impossible for law enforcement to obtain *Lauria*'s fingerprints from the search at 94 Foster Street.[27] Moreover, it is not at all clear that Special Agent Kline or the prosecutors were even aware of the Grice report, as evidenced by Kline's testimony cited by Pappas. A157 ("Q. Isn't it a fact that you had fingerprints of Ronald Fassett at 94 Foster Street? A. That, I don't recall.").

As discussed in Section VII, *supra*, even assuming *arguendo* that Special Agent Kline gave perjurious testimony, any error would be subject to harmless error review. Whether or not Pappas's fingerprints were identified at the evidence seized from 94 Foster Street is of marginal relevance, since the conspiracy charge did not require proof of Pappas's presence at a particular location or his handling of any evidence. Moreover, there was, as this Court has already found on direct review, "ample" evidence at trial to convict him of that charge. *Pappas*, 199 F.3d 1324, 1999 WL 980957, at *3.

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[26] (...continued)
date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence").

[27] Indeed, several witnesses testified independently at trial that Lauria used rubber gloves when he cooked crack. GA30-31 (Fassett); GA331 (Laguna); GA88 (Bellucci). Thus, Special Kline's testimony was entirely consistent this evidence.

In addition, any misstatement in Special Agent Kline's trial testimony regarding Lauria's fingerprints is negated by his testimony regarding *Pappas's* fingerprints. Under cross-examination by Pappas's trial counsel, Kline testified that he did not believe that he had any fingerprint analysis relative to Pappas in the investigation. GA330. Thus, even if Special Agent Kline was aware of the Grice report at the time he testified, his testimony was not perjurious and, even if it were, it was harmless in the context of the substantial evidence of Pappas's guilt at trial.[28]

XI. Pappas's ineffective assistance claims

A. Pappas's trial counsel did not labor under an actual or potential conflict of interest.

Pappas argues that he had ineffective assistance of counsel based on trial counsel's conflict of interest because (1) the trial court did not conduct an inquiry to determine the nature and extent of the potential conflict and (2) his trial counsel had an actual conflict of interest.

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[28] Pappas also asserts that the Government did not disclose the Grice report before trial. Grice did not testify at trial. To the extent that Pappas is asserting a *Brady* or *Giglio* claim, it fails because Pappas cannot show that the absence of any fingerprint evidence from the search of items seized from 94 Foster Street would have been material to his defense, given the overwhelming evidence at trial. *See Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995).

Both arguments arise from Pappas's trial counsel's former representation of a co-defendant of Ronald Fassett, a Government witness against Lauria and Pappas, in another criminal case.

1. Relevant facts

Pappas's trial counsel, Bruce Koffsky, briefly represented Frank Parise, a defendant in *United States v. Luciano et al.*, 3:95-cr-00135 (PCD). Parise was indicted, along with Ronald Fassett and eighteen others, for conspiracy to distribute cocaine and crack. A373-74. Parise was convicted on December 30, 1996, after a trial and was subsequently sentenced to 192 months of imprisonment. GA315 at Docket No. 766, GA316 at Docket No. 1084.[29]

Pappas correctly notes that Koffsky was appointed to represent Parise in *Luciano* on September 28, 1995, filed an appearance on October 6, 1995, and moved to withdraw on January 17, 1996. The motion to withdraw was granted on January 25, 1996. During the relatively brief period that Koffsky represented Parise, he filed a few pretrial motions, including a motion to transfer the case to the New Haven federal courthouse, a motion to adopt the motion of another defendant to extend time to file pretrial motions, a motion for authorization to expend money for copying charges, and a motion for review of Parise's

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[29] On March 21, 1996, Fassett pled guilty to two counts of narcotics trafficking in the *Luciano* case. GA45-46.

detention order. Koffsky also represented Parise at a review hearing of his detention. A356.

Koffsky was not appointed to represent Pappas in this case until April 21, 1997, nearly fifteen months after his representation of Parise ended.

2. Governing law

The Sixth Amendment's right to counsel includes the right to be represented by an attorney free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). The right may be violated if the attorney has either "(1) a potential conflict of interest that resulted in prejudice to the defendant or (2) an actual conflict of interest that adversely affected the attorney's performance." *United States v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994). "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Blount*, 291 F.3d at 211(internal quotation marks omitted). "A conflict may be rooted in the attorney's prior representation of a person whose interests are antagonistic to those of his present client." *Id.*

When a trial court knows or reasonably should know that a conflict exists, it can, and generally should, make an initial inquiry to investigate the facts and details of the attorney's interest to assess whether there is any conflict. *Levy*, 25 F.3d at 153. However, there is no duty to inquire "whenever, as a result of creative speculation, one could

imagine a situation in which a conflict may have arisen." *United States v. Velez*, 354 F.3d 190, 198 (2d Cir. 2004). In *Mickens v. Taylor*, 535 U.S. 162, 168-69 (2002), the Supreme Court "specifically counseled against requiring inquiry whenever the trial court is aware of a vague, unspecified possibility of conflict." *Velez*, 354 F.3d at 198 (internal quotation marks omitted). Indeed, "the trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice." *Blount*, 291 F.3d at 211-12 (internal quotation marks omitted). "The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Mickens*, 535 U.S. at 173. Rather, a defendant must still show that any potential conflict caused prejudice and that any actual conflict adversely affected his counsel's performance. *Id.* at 174.

3. Discussion

The court did not err when it made no inquiry into the possibility of any conflict between Koffsky's former representation of Parise and his representation of Pappas. Pappas posits that Koffsky was hindered in his ability to cross-examine Fassett's testimony that drugs at 94 Foster Street were part of the Lauria-Pappas conspiracy out of an abiding concern for Parise, Fassett's co-defendant in the *Luciano* case. Although Parise had already been convicted by the time of Pappas's trial, he had not been sentenced. Thus, Pappas speculates that Koffsky held back on pursuing a more forceful defense to help Parise at his sentencing.

In effect, Pappas advocates that, whenever a counsel's former client and co-defendant of a Government witness in another case faces some speculative adverse effect as a result of counsel's defense strategy, there exists a conflict that requires a conviction to be vacated. *Cf. Velez*, 354 F.3d at 197 ("Defendant presents no basis for devising a rule[] that requires the trial court to hold a hearing, much less replace counsel, merely because one can imagine unlikely events that may give rise to a conflict."). Here, Koffsky's representation of Parise had ended long before he began representing Pappas. His representation of Parise was brief and involved only bail and administrative matters. Indeed, in a court-requested affidavit addressing Pappas's ineffective assistance allegations, Koffsky stated that he "has no clear recollection as to whether during that brief representation [of Parise] the undersigned obtained any discovery in that matter." A203. Nor is there any indication that, during his representation of Pappas, Koffsky was even aware of his former client's fate in the *Luciano* matter, much less that he was aware of how any defense might have affected Parise. The court did not err in not inquiring into this vague and speculative conflict.

Even if there were a potential conflict as a result of Koffsky's former representation, Pappas has not shown that he suffered any prejudice as a result. As discussed in Sections I.F and III, *supra*, the drugs seized from 94 Foster Street were hardly the centerpiece of the Government's case.

Pappas also claims that Koffsky labored under an actual conflict of interest. As demonstrated above,

Koffksy did not actively represent Parise's interest while he was representing Pappas. *Mickens*, 535 U.S. at 175 ("Until . . . a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.") (internal quotation marks omitted). Furthermore, Pappas has not demonstrated any adverse effect on Koffsky's representation. Notably, Pappas does not argue that Koffsky failed to advance a defense theory as a result of any alleged conflict. Rather, his claim rests on his assertion that Koffsky did not pursue a defense theory aggressively enough. The record demonstrates, however, that Koffsky vigorously cross-examined Fassett and highlighted his motivation to attribute the drugs seized from 94 Foster Street to Pappas instead of to his *Luciano* co-conspirators. GA61-76.[30] Accordingly, this claim should be rejected.

B. Pappas cannot show that trial counsel failed to adequately prepare for trial.

Next, Pappas argues that Koffksy was ineffective because he failed to adequately prepare for trial. In addressing this claim, the court found the following facts:

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[30] More specifically, Koffsky introduced into evidence the *Luciano* indictment and read to the jury the counts that charged Fassett. GA61-68. In a cross-examination that covered 50 pages of the transcript, Koffsky questioned Fassett on the penalties he faced for the charges in *Luciano* and his motivation for cooperating with the Government. GA69-76.

Attorney Koffsky began representing Pappas on or about April 24, 1997, when it became apparent that [] there had been a breakdown in communications between Pappas and the CJA counsel appointed to represent him. (Koffsky Aff. 2, Nov. 15, 2006 [A201].) Attorney Koffsky asserts that his records reflect that prior to the start of trial on July 21, 1997, he had a telephone conference with Pappas on April 24, 1997, met with Pappas at the Wyatt Detention Facility in Rhode Island for two hours on May 4, 1997, had a telephone conference with Pappas on May 12, 1997, again met with Pappas for two hours at Wyatt on May 15, 1997, and had a conference with Pappas prior to jury selection at the New Haven District Court on June 6, 1997. (*Id*. at 3 [A201-02].) In addition, Attorney Walkley—Koffsky's then-law partner—had a conference with Pappas at Wyatt on June 27, 1997, had a meeting with Pappas and represented him at a "relatively lengthy" detention hearing on July 1, 1997, appeared with Pappas for purposes of a handwriting exemplar on July 9, 1997, and was present, along with Attorney Koffsky, for jury selection and trial in this matter. (*Id*. at 3-4 [A201-02].) Attorney Koffsky asserts that trial strategy was discussed during the May 15, 1997 jail visit and throughout his representation of Pappas. (*Id*. at 4 [A202].) In his responsive affidavit, Pappas admits that there was more than one conversation prior to trial, but argues that they were short and that no trial strategy was discussed. (Pappas Aff. ¶ 4, Dec. 5, 2006 [A208].)

A361.[31] These findings are not clearly erroneous. In any case, given the "ample" evidence to support Pappas's guilt on all counts, *Pappas*, 199 F.3d 1324, 1999 WL 980957 at *3, Pappas cannot show any prejudice. *See* Sections I.F and III, *supra*.

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[31] Attorney Walkley, who is counsel of record for Lauria in this appeal, represented Pappas at trial. Walkley filed an appearance on behalf of Pappas on May 30, 1997, and a motion to withdraw on November 21, 1997. By letter of April 13, 2009, the U.S. Attorney's Office wrote to both Defendants to notify them of this fact and stated that it was "currently taking no position as to whether, if at all, a conflict of interest exists in Attorney Walkley's current representation of petitioner Lauria." GA317. By letter dated May 4, 2009, Pappas stated that Walkley "was *not* one of the trial attorneys in this case." GA319. Pappas further stated that "there is no need for concern over any potential or actual conflict. My co-appellant and I are fully united in our effort to obtain relief from our unconstitutional convictions. To the extent that there is any remote possibility of a potential conflict, you may deem such waived. My co-appellant and I will execute a waiver with Attorney Walkley for his files." *Id.* Given this representation and the lack of allegation of ineffective assistance in Walkley's representation of Pappas, the Government does not believe that Walkley's representation of Lauria in this appeal presents a conflict of interest.

C. The failure to interview Pappas's ex-fiancee and call her as a witness was not objectively unreasonable.

Pappas challenges Koffsky's alleged failure to interview and to call at trial Michelle Consiglio, Pappas's ex-fiancee. Pappas alleges that her testimony would have rebutted the Government's evidence against him on the retaliation counts by testifying "that the physical altercation between Pappas and R. Fassett was the product of an encounter during which R. Fassett and his companion Paul DeLuca ('DeLuca') made derogatory and threatening statements, rather than retaliation against R. Fassett based on his cooperation." Pappas Br. at 123; *see also* A186-87.

1. Relevant facts

At trial, Fassett testified that at about 11 p.m. on September 14, 1996, Pappas came to Fassett's residence in New Haven. GA47-48, GA57-58. When Pappas refused to leave after Fassett's girlfriend asked him to, Fassett asked Pappas what he was doing there. GA49. Pappas told Fassett to get in a white Cadillac sitting in the driveway with several people in the back seat. GA49, GA57. Fassett heard voices coming from the car, one of which was Lauria's. GA50. Fassett then saw Lauria standing outside the car, telling Pappas, "Come on, Mark. Just grab him and come on." *Id.* Lauria also kept repeating to Fassett, "Do the right thing." *Id*. As Fassett heard a noise and looked to see if someone was pointing a gun out of the car, Pappas struck Fassett in the face.

GA51-53. Thereafter, Pappas ran back to the car and left. GA54. Fassett contacted law enforcement authorities to report the incident. *Id*. Fassett's testimony was substantially corroborated at trial by Christy Fassett, his wife, who saw the altercation. GA323-29.

2. Discussion

Pappas cannot demonstrate either deficiency or prejudice under *Strickland*. Koffsky's defense strategy on the retaliation counts was to attack the credibility of Fassett and question his motives for testifying for the Government. GA2-3. Koffsky also elicited testimony suggesting that, because Fassett and Pappas grew up together and had an altercation when they were younger, there was a history between the two men that could have explained Pappas hitting Fassett. GA59-60. This was not an unreasonable defense strategy. Moreover, Pappas cannot show that there was a reasonable probability that Consiglio's testimony would have led to a different result at trial. Pappas does not proffer any affidavits from Consiglio, nor does he even state that she was present when Pappas struck Fassett. Thus, she would not have been able to credibly testify about Pappas's intent in striking Fassett. In addition, this Court has already concluded, in rejecting Pappas's sufficiency argument on direct review, that there was "ample" evidence of Pappas's guilt on the retaliation counts. *Pappas*, 199 F.3d 1324, 1999 WL 980957 at *3.

D. There was no ineffective assistance in failing to move to dismiss the witness retaliation counts on alleged Speedy Trial Act violations.

Pappas alleges that Koffsky was constitutionally deficient in failing to file a motion to dismiss the witness retaliation counts based on alleged Speedy Trial Act violations. This claim fails for the same reasons discussed in Section IV.D, *supra*. Although Lauria's ineffective assistance claim rested on the conduct of appellate counsel as opposed to trial counsel, the same reasoning applies to Pappas's claim.

E. Pappas cannot demonstrate ineffective assistance from his trial counsel's alleged disregard of his desire to testify.

Pappas's final contention of ineffective trial counsel is that he "disregarded Pappas's unequivocally expressed desire to testify on his own behalf at trial." Pappas Br. at 21. He further claims that the court erred in failing to hold a hearing on this claim.

1. Relevant facts

In support of this claim, Pappas filed two unsworn affirmations, A185-97, A207-29, in which he states that "I was not given any option by Attorney Koffsky" to testify. A226. Moreover, Pappas asserts that "there was no justifiable reason for Mr. Koffksy to refuse to put on a defense which at least included my testimony," A195, since Pappas was the only person who could refute what

he believed to be key evidence against him.

The court requested that Mr. Koffsky submit an affidavit responding to these and other ineffective assistance allegations. A180-81. In Koffsky's affidavit, he recalls that "it was a strategic decision on the part of both Mr. Pappas and the undersigned that he not testify." A206. He also stated that "[i]t is the undersigned's normal course in representing a criminal defendant to voice the undersigned's opinion as to whether a client should or should not take the stand and testify on his own behalf, but that it is ultimately the client's decision, and the undersigned also makes that abundantly clear." *Id.*

Koffsky also explained that Pappas had attended a proffer session with the Government during which he detailed his involvement in narcotics trafficking activities. *Id.* Indeed, the proffer Pappas gave on January 7, 1997, with predecessor counsel would have been highly damaging had Pappas taken the stand.[32]

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[32] As summarized by the court below, Pappas stated during his proffer that "he began to sell cocaine in the beginning of 1994 at which time he was purchasing approximately one (1) ounce of cocaine per week from [name withheld by government] and Ronald Fassett." A359. Pappas further stated that he "would go to . . . [a] New Haven residence to procure the cocaine from . . . Fassett," and that "the cocaine was seized out of 94 Foster Street, New Haven, CT." *Id.* Pappas also admitted to federal officers that "he and Lauria would occasionally use the third floor apartment above Nancy's Café, 225 Farren Avenue, New Haven, CT to rerock (continued...)

2. Governing law

A criminal defendant has the right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). Because this Court has held that the right to testify is personal, a defendant who wishes to testify must be permitted to do so, "regardless of the strategic considerations that his lawyer concludes weigh against such a decision." *Chang v. United States*, 250 F.3d 79, 83 (2d Cir. 2001) (internal quotation marks omitted). Accordingly, "any claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant's desire to testify—must satisfy the two-prong test established in *Strickland* . . . ." *Brown*, 124 F.3d at79.

Nevertheless, this Court has cautioned against accepting a defendant's generic claim at face value, which "can be, and is often, made in any case in which the defendant fails to testify [] based solely on his own highly self-serving and improbable assertions." *Id.* at 86. A hearing in such cases is not necessary where the court supplements the record with an affidavit from trial counsel and the court is "intimately familiar with the trial proceedings and the events and circumstances surrounding them." *Id.* at 85, 86. In such cases, a court may exercise its discretion to deny an evidentiary hearing to "avoid[] the

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[32] (...continued)
cocaine . . . ." A360. Pappas vehemently denies that he made any such statements in his proffer. A225-28.

delay, the needless expenditure of judicial resources, the burden on trial counsel and the government, and perhaps the encouragement of other prisoners to make similar baseless claims . . . ." *Id.* at 86.

3. Discussion

Here, Koffsky repeatedly stated that the decision not to testify was an issue he discussed with his client and one they made together. A206. Although the court did not conduct a hearing on Pappas's claim, it was thoroughly familiar with both Koffsky's and Pappas's credibility and demeanor because it presided not only over a six-day trial, but also at Pappas's lengthy sentencing in which he represented himself. Under these circumstances, the court did not abuse its discretion in denying Pappas's claim without a hearing. *Chang*, 250 F.3d at 86 (noting that a court could "reasonably decide[] that the testimony of [defendant] and his trial counsel would add little or nothing to the written submissions").

Nor can Pappas demonstrate any prejudice. Pappas does not explain in any detail what his testimony would have been had he testified or how he would have refuted the Government's proof. Moreover, given the potential impact that Pappas's proffer would have had on cross-examination, Pappas does not state how he could have addressed his earlier statements. Accordingly, this claim should be denied.[33]

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[33] Because Pappas has failed to show that his trial (continued...)

XII. Pappas's remaining claims should also be rejected.

A. The *Apprendi* challenge to the sentence is procedurally defaulted and not excused.

Pappas raises his own *Apprendi* challenge to his sentence of 360 months on Count One of the superseding indictment. Specifically, he alleges that his sentence exceeds the twenty-year statutory maximum under 21 U.S.C. § 841(b)(1)(C) for which he was charged and convicted. He also alleges that the court, in its analysis rejecting this claim, improperly relied on § 841(b)(1)(C)'s 30-year statutory maximum because the court had properly stricken the Government's Section 851 notice under then-existing circuit law.

This claim is procedurally defaulted because he did not raise this claim on direct appeal. *See* Section I.B, *supra*. Pappas does not offer any reason to excuse the procedural default other than in joining in Lauria's arguments, which were already discussed in Section I, *supra*. Accordingly, this claim should be rejected.

B. The discovery motion has no merit.

Pappas argues that he should be entitled to a hearing

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[33] (...continued)
counsel acted unreasonably as to any ineffective assistance claim, his cumulative error claim also fails.

and discovery into why he was not indicted in the *Luciano* conspiracy in order to support his conflict of interest and ineffective assistance of counsel claims. This claim merely reiterates the arguments he made in relation to those claims.

C. The recusal claim is unsubstantiated.

Finally, Pappas argues that the district judge should have recused himself based on alleged *ex parte* communications with the Government and because of a series of what Pappas characterizes as highly biased decisions. This claim is procedurally defaulted and, in any case, based on pure speculation and surmise.

CONCLUSION

For the foregoing reasons, the district court's denial of Lauria and Pappas's motions under 28 U.S.C. § 2255 motions should be affirmed.

Dated: May 27, 2009

Respectfully submitted,

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

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 20,951 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. The Court has granted the government permission to file a brief that does not exceed 21,000 words.

DAVID T. HUANG
ASSISTANT U.S. ATTORNEY

ADDENDUM

Article I

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

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.

18 U.S.C. § 1513

. . . .

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

. . . .

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

. . . .

(f) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 3161

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

. . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

. . . .

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

. . . .

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or

$8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. . . .

(B) In the case of a violation of subsection (a) of this section involving--

. . . .

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

. . . .

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

. . . .

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life

imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. . . . .

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 5G1.2

(a) . . . [T]he sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

(b) Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.