11-2369

To Be Argued By:
ALINA P. REYNOLDS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2369

LESLIE MORRIS,
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA
Appellee.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Table of Contents

Table of Authorities iii

Statement of Jurisdiction vii

Statement of Issue Presented for Review..... viii

Preliminary Statement.....1

Statement of the Case 3

Statement of Facts and Proceedings
Relevant to this Appeal 4

A. The offense conduct.....4

B. Jury deliberations 5

C. The direct appeal.....8

D. Section 2255 proceedings.....9

Summary of Argument 16

Argument..... 17

I. The petitioner's habeas claim that the district court violated his constitutional rights by allowing the jury to bring home the jury charge for one night at the start of deliberations fails both because it has been procedurally defaulted and because the decision did not prejudice him in any way.....17

A. Relevant facts 17

B. Governing law and standard of review 17

1. Habeas corpus relief 17

2. The right to be present 20

C. Discussion 22

1. This claim was never raised before and, therefore, is procedurally defaulted 22

2. The district court's failure to follow Rule 43 was harmless 26

Conclusion 31

Certification per Fed. R. App. P. 32(a)(7)(C)

Addendum

Table of Authorities

Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

Brecht v. Abrahamson,
507 U.S. 619 (1993) 19

Chapman v. United States,
386 U.S. 18 (1967) 26

Ciak v. United States,
59 F.3d 296 (2d Cir. 1995) 18

Coleman v. Thompson,
501 U.S. 722 (1991) 19

Coleman v. United States,
329 F.3d 77 (2d Cir. 2003) 20

Fountain v. United States,
357 F.3d 250 (2d Cir. 2004) 20

Hill v. United States,
368 U.S. 424 (1962) 18

Napoli v. United States,
32 F.3d 31 (2d Cir. 1994),
amended on reh'g on other grounds,
45 F.3d 680 (2d Cir. 1995) 18

Reed v. Farley,
512 U.S. 339 (1994) 19, 24

Rosario v. United States,
164 F.3d 729 (2d Cir. 1998) 23

Strickland v. Washington,
466 U.S. 668 (1984) 18

Strickler v. Greene,
527 U.S. 263 (1999) 19

United States v. Adeniji,
31 F.3d 58 (2d Cir. 994) 21

United States v. Ballistrea,
101 F.3d 827 (2d Cir. 1996) 22

United States v. Canady,
126 F.3d 352 (2d Cir. 1997) 20, 23

United States v. Collins,
665 F.3d 454
(2d Cir. 2012) 20, 21, 22, 27, 30

United States v. Fontanez,
878 F.2d 33 (2d Cir. 1989) 22

United States v. Harrington,
689 F.3d 124 (2d Cir. 2012) 20

United States v. Hayman,
342 U.S. 205 (1952) 18

United States v. Henry,
325 F.3d 93 (2d Cir. 2003) 21

United States v. Jones,
296 Fed. Appx. 179 (2d Cir. 2008)..... 3, 9

United States v. Mejia,
356 F.3d 470 (2d Cir. 2004) 21, 27

United States v. Robinson,
560 F.2d 507 (2d Cir. 1977) 12

United States v. Ronder,
639 F.2d 931 (2d Cir. 1981) .....*passim*

United States v. Ulloa,
882 F.2d 41 (2d Cir. 1989) 13, 14, 29

Zhang v. United States,
506 F.3d 162 (2d Cir. 2007) 19, 24

Statutes

28 U.S.C. § 2253 ..... vii, 3

28 U.S.C. § 2255 .....*passim*

18 U.S.C. § 3231 vii

Rules

Fed. R. App. P. 4 vii

Fed. R. Crim. P. 43..... 7, 10, 11

Statement of Jurisdiction

This is an appeal from a final judgment entered in the United States District Court for the District of Connecticut (Peter C. Dorsey, J.), which had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 2255. On May 12, 2011, the district court denied the petitioner's motion for relief under 28 U.S.C. § 2255. Government's Appendix ("GA") 3, GA36. Judgment entered on May 16, 2011. GA3.

On June 9, 2011, the petitioner filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). GA3. On that same date, the petitioner filed a motion for the issuance of a certificate of appealability as to the one issue raised in this appeal, pursuant to 28 U.S.C. § 2253(c)(1)(B), and on June 17, 2011, the district court granted that motion. GA3, GA45-GA46.

Statement of Issue Presented for Review

Has the petitioner satisfied the "cause" and "prejudice" standard for having failed to raise at trial and on direct appeal the claim that the district court deprived him of his constitutional rights by permitting the jury to take home a copy of the jury charge for one night during deliberations and, if so, did the district court err in concluding that its decision to let the jury take home the charge did not violate the petitioner's constitutional rights or cause him prejudice?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2369

LESLIE MORRIS,
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA
Appellee.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In 2003, the petitioner, along with four co-defendants, went to trial on charges that arose out of his participation in a violent drug trafficking enterprise that operated in a housing complex in Bridgeport, Connecticut. The trial lasted seven weeks, and after eight days of deliberations, the jury convicted the petitioner of a variety of offenses, including conspiracy to commit murder in aid of racketeering, use of a firearm in

relation to a crime of violence and conspiracy to distribute more than 1000 grams of heroin and 50 grams of cocaine base.

Late in the day of the first full day of deliberations, the jury sent a note to the court asking whether each juror would be permitted to take his or her copy of the jury charge home that night. The court, without consulting the parties because they had left for the day, permitted the jurors to so. The following day, the petitioner's counsel objected to this procedure, and a co-defendant's counsel asked the court to instruct the jury that they would no longer be permitted to take home the jury instructions home. The court granted this request. The petitioner never asked for a mistrial or any other remedy and, though he raised eight claims on direct appeal, including a challenge to the district court's questioning of witnesses during the course of the trial and a challenge to a portion of the jury instructions, he never raised the claim he now raises on collateral review.

In his *pro se* brief, the petitioner claims that his constitutional rights to a fair trial and due process were violated when the district court permitted the jurors to take home the jury charge overnight. This Court should reject the claim both because the petitioner failed to satisfy the "cause" and "prejudice" standard for claims raised for the first time in a habeas petition and because, as the district court concluded

below, the petitioner has failed to show how he was prejudiced by the court's decision.

Statement of the Case

On April 24, 2003, following a seven-week trial, a jury found the petitioner, Leslie Morris, guilty of Counts One (RICO), Two (RICO conspiracy), Five (narcotics conspiracy), Thirteen (conspiracy to commit VCAR murder), Fourteen (VCAR murder), and Fifteen (Use of a firearm in connection with a crime of violence). GA31.

On September 3, 2003, the district court sentenced the petitioner to four concurrent terms of life imprisonment, one concurrent term of 120 months' imprisonment and one consecutive term of five years' imprisonment. GA33. The petitioner filed a direct appeal, and on October 20, 2008, this Court affirmed the judgment of the district court by summary order. *See United States v. Jones*, 296 Fed. Appx. 179 (2d Cir. 2008).

On September 28, 2009, the petitioner filed with the district court a *pro se* petition for relief pursuant to 28 U.S.C. § 2255. GA2. On May 12, 2011, the district court (Peter C. Dorsey, J.) denied the petitioner's motion for relief. GA3, GA36. On June 9, 2011, the petitioner filed a motion for the issuance of a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(1)(B), and on June 17, 2011, the district court granted that motion. GA3, 45.

This appeal followed.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

The evidence at trial demonstrated the existence of a wide ranging organization of drug traffickers and sellers who operated primarily on the west side of Bridgeport, Connecticut in the P.T. Barnum Housing Project. Pre-Sentence Report ("PSR") ¶ 1. This organization focused its activities on two areas within the housing project, the "Middle Court" area and the "D Top" area. PSR ¶¶ 8, 20. For approximately five years, the organization and its members engaged in a broad reaching scheme to maintain their dominance in street level narcotics sales at P.T. Barnum, including multiple violent acts such as murder and attempted murder. PSR ¶¶ 10-12, 21, 34. At trial, the government relied upon the testimony of cooperating witnesses, who included the organization's street level sellers and middle level lieutenants, together with the corroborating testimony of law enforcement officers, to prove its case. PSR ¶¶ 7, 77.

The petitioner participated in the Middle Court drug conspiracy as a street level dealer; he had joined the drug enterprise during the summer of 1998. He worked primarily for John Foster and Willie Nunley, who were two of the lieutenants supervising the distribution of narcotics. PSR ¶¶ 8, 9. The members of the conspiracy relied upon violence and threats of violence to

maintain their operations and to ensure that only the enterprise's drugs were sold in the Middle Court. They regularly wore bullet proof vests and carried firearms. PSR ¶12.

On August 2, 1998, the petitioner got into a dispute with Kenneth "Inky" Porter over a dice game that they were playing near Building 14 in P.T. Barnum, which ended when Porter grabbed money from the petitioner. PSR ¶ 80. When Nunley arrived in the area and heard about the incident, he angrily questioned the petitioner and told him, "I wouldn't let nobody punk me down like that . . . if you don't do him, I'll do you." PSR ¶ 81.

Ilyhundai Porter was in P.T. Barnum the day her cousin, Kenneth Porter, was shot. She heard gunshots and observed the petitioner standing with his arm extended holding a gun pointed in the direction where she had just seen Kenneth Porter. When she realized that it was her cousin that had been shot, she ran over to him and found him lying on the ground, suffering from several gunshot wounds. She said to him "Boo Boo shot you," in response to which he nodded his head and confirmed that the petitioner had been the shooter. PSR ¶ 84.

B. Jury deliberations

On April 15, 2003, the district court charged the jury. GA30, GA127. Given the length and complexity of the jury instructions, the court

provided each juror with a copy of the jury charge and permitted them to retain these copies during deliberations. GA129.

In its final remarks to the jury, the court instructed the jury that it should reduce to writing any inquiries or communications with the court during deliberations. GA131. The court also stated that, when it received a note from the jury it would "respond as promptly as possible, either in writing or, more likely, by having you return to the court so that I can address you orally." GA131. The court explained that this procedure was necessary so that "any communication between us will be on the record." GA131. The jury retired to deliberate at the conclusion of the judge's instructions. The petitioner raised no objection to the jury charge. GA147.

The jury began its deliberations on the afternoon of April 15, 2003. GA30, GA134. That same day, the jury sent three notes to the district court that were marked as court exhibits 8, 9, and 10. GA48. On April 16, 2003, the jury returned to court and resumed its deliberations. On that first full day of deliberations, the jury sent four notes to the district court. GA48. The fourth note came at the end of the day on April 16 and was marked as court exhibit 14. GA47-GA48.

In it the jury asked, "May we take the charge home?" GA47. Before responding to the note, the district court checked to see if trial counsel

were still present in the courtroom, but, given the late hour, all counsel had left the courthouse. GA52. The district court decided it would permit the jury to take a copy of the jury instructions home that night, and sent its courtroom deputy into the jury room to deliver the message. GA52. The district court also asked the courtroom deputy to remind the jurors that they were not permitted to discuss the case with anyone, and the jurors acknowledged they would follow this instruction. GA52.

The next day, counsel for petitioner objected to the jurors having been permitted to take their copy of the jury instructions home for the night, and a co-defendant's counsel asked that this practice not continue. GA52-GA53, GA56. The district court agreed and determined that it would not permit the jurors to take the instructions home again. GA57. The petitioner never asked for any other remedy, did not request a mistrial or otherwise allege that his constitutional right to a fair trial or his rights under Fed. R. Crim. P. 43 had been violated. GA52-GA92. Prior to dismissing the jury for the weekend, the court advised:

> What we discussed before is that you took a charge home last night. I would prefer that you not take it home with you tonight. I think by now you probably read through it enough to be aware of what's

> involved, and you will have the charge in there with you when you continue.

GA92. The petitioner did not object to this instruction and made no other requests related to this issue. GA92.

The jury deliberated for eight days and sent a total of seventeen notes to the court in which it made a variety of inquiries, including requests for read back of trial testimony and clarification of the applicable law. GA48-GA49. The jury reached its guilty verdict on April 24, 2003, convicting the petitioner on all of the counts against him. GA31.

C. The direct appeal

On September 18, 2003, the petitioner filed a timely notice of appeal to this Court. GA33. On appeal, he raised seven claims related to his conviction and sentence: (1) he challenged the sufficiency of the evidence; (2) he argued that the district court erred in its methodology for calculating the quantity of heroin and cocaine base involved in the offense; (3) he claimed that the district court erred in failing to instruct the jury on the interstate nexus element of the VCAR offenses; (4) he maintained that the government committed prosecutorial misconduct during closing argument; (5) he alleged that the district court committed misconduct through its "rigorous questioning" of a government witness; (6) he asserted that his convictions violated the

Commerce Clause; (7) he stated that the narcotics conspiracy statute was unconstitutionally vague; and (8) he argued that he was improperly convicted of state crimes in a federal court. *See Jones*, 296 Fed. Appx. at 181-184. The petitioner did not challenge the district court's decision to permit the jurors to take home a copy of the jury instructions for one night during deliberations or the district court's response to the objection raised by counsel at the time. On October 20, 2008, this Court rejected all of the petitioner's claims and affirmed the judgment of the district court. *Id.*

D. Section 2255 petition

On September 28, 2009, the petitioner filed a *pro se* § 2255 motion in which he made three claims: (1) that the government made "two improper statement[s]" in its closing argument at trial that "deprived [him] of a fair trial and failed to prove all elements of VCAR"; (2) that the district court committed judicial misconduct when it questioned certain witnesses during the trial; and, (3) that "[t]he trial judge allowed the jury to take home the charge sheet in the middle of deliberation[s] and in the absen[se] of defense counsel." GA100-GA101. The petitioner did not file a memorandum in support of his motion and did not provide any citations to the trial record in support of his claims. GA96-GA104.

On March 22, 2010, the government filed a response to the petitioner's § 2255 motion. Alt-

hough it made a procedural default argument as to the first two claims, it did not make such an argument as to the third claim. GA112-GA114. On that issue, the government, mistakenly believing there was no factual basis to support the argument that the district court permitted the jury to take home the charge during deliberations, maintained:

> The record at trial is devoid of any facts to support such a claim. To the contrary, the record establishes that the jury was carefully instructed prior to, and during deliberations, to deliberate only in the jury room when all of the jurors were present. . . . There is simply nothing in the record that supports the defendant's claim that the jury was given a copy of the charge to take home with them.

GA114.

On August 3, 2010, the petitioner filed a reply to the government's response in which he expanded his arguments and citations to the trial record. GA119. In particular, he alleged that, on or about April 16, 2003, the district court had "accepted a note from the jury asking to take the charge sheet home in the middle of deliberation[s]," and the court "allow[ed] it" without obtaining input from the petitioner or his counsel. GA119. The petitioner maintained that the district court failed to read and consider the jury's note in the presence of counsel and on the record

and failed to seek advice from counsel on an appropriate response. GA119. He alleged that, not only did this procedure go against the court's own instructions that all jury notes should be read in open court, it violated Fed. R. Crim. P. 43 and the petitioner's due process rights. GA120.

On May 12, 2011, the district denied the petitioner's § 2255 motion in a written ruling. GA36-GA44. The district court concluded that the first two claims – that the government had committed prosecutorial misconduct during closing argument and that the court had committed judicial misconduct when it questioned witnesses at trial -- were identical to claims that had been raised and rejected on direct appeal. Thus, as the district court explained, "Petitioner is barred from raising the same claims again, and his § 2255 motion as to those two claims is denied." GA38.

As to the third claim, the court denied it on the merits. At the outset, it set forth the following facts, largely agreeing with the petitioner's characterization in the § 2255 motion:

> In this case, during deliberations, the jury sent a note to the court after the parties were excused for the day, which requested permission to take a charge home for the time. (Tr.4/17/03 at 3.) The court permitted the jury to do so, and cautioned them not to discuss the case

> with anyone. *Id.* The following day, Petitioner's counsel learned what had occurred, and stated that had he been aware of the note and the request, he would have objected. *Id.* Subsequently, the court decided that the jury would not be permitted to take the charge home again because, "if they wanted to have an opportunity to individually read through it, they had the opportunity last night." *Id.*

GA40.

Next, the court analyzed the two cases submitted by the petitioner in support of his claim that his due process rights had been violated. As to *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977), in which this Court upheld a district court's decision to provide a second *Allen* charge in response to a jury note without consulting counsel, the court found that the decision supported a finding that its "actions were non-prejudicial." GA41. Just as "there was no need for the judge to consult with defense counsel concerning his response" in *Robinson*, "the jury's note in this case raised no new questions of law." GA41.

As to *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981), in which this Court held that the district court committed prejudicial error when it responded to three juror notes with additional instructions without consulting counsel, the

court found that this case was different in three ways. GA41. First, in *Ronder*, which involved a deadlocked jury that received two *Allen* charges and an explanation of the elements of one of the charges without input from the parties, this Court "could not say with fair assurance that the procedural error in the handling of the jury's inquiries did not affect the verdict because of the heightened significance afforded to the trial judge's response." GA42 (internal quotation marks omitted). But here, the jury expressed no difficulty in reaching a verdict and there was no "heightened significance" given to the court's response to the note. GA42. Second, in *Ronder*, this Court focused on the content of the district court's instructions and criticized that content as being incomplete and unfair to the defendant. GA42. Here, the court gave no additional instructions and simply allowed the jury to bring home a copy of the original jury charge. GA42. Third, whereas in *Ronder*, the court failed to disclose three notes from the jury on the final day of deliberations, here the court failed to disclose one note, which came at the end of the day after counsel for both parties had left the courthouse. GA42-GA43.

Instead, the court relied on *United States v. Ulloa*, 882 F.2d 41 (2d Cir. 1989), in which this Court did not fault the district court for "repeatedly entertain[ing] oral questions and respond[ing] to them without seeking the views of

counsel as to appropriate responses." GA43 (internal quotation marks omitted). The Court indicated in *Ulloa* that a trial judge must be "afforded discretion in handling jury inquiries." GA43. This court relied on that holding to find that "no prejudicial error has occurred." GA43. As the court explained,

> There was no risk posed by the judge's decision to grant the jury's request to take the charge home for a single night. The judge did not make any substantive changes or offer supplemental instructions. By allowing the jurors to bring home a copy of the charge that had been previously given, the judge simply permitted the jurors to more closely examine a charge that Petitioner's counsel had already been given an opportunity to examine and challenge. . . . Thus, Petitioner's counsel's presence would have been nothing more than a "shadow benefit," and his absence did not thwart a fair trial because the trial judge did not issue an instruction containing new issues of law or additional instructions that Petitioner's counsel did not previously have the opportunity to review. What is more, the district court took proper precautions. The judge only allowed the jurors to take the charge home for a single night, and the judge warned the jurors not to con-

> duct independent legal research and not to discuss the case with anyone.

GA43-GA44.

In the end, the district court acknowledged that it had "strayed from proper procedure," but found that "the decision to allow the jurors to take home a copy of the original charge did not constitute prejudicial error." GA44.

On June 9, 2011, the petitioner filed a motion for the issuance of a certificate of appealability only as to the third issue raised on the § 2255 motion, i.e., the claim that his constitutional rights were violated by the district court's decision to let the jury take home the charge for one night. GA3, 122-126. On June 17, 2011, the district court issued a written ruling granting the petitioner's motion for a certificate of appealability. GA45. The court noted that the claim was "not insubstantial" and that, to receive the certificate, the petitioner "need not show that he would prevail on the merits," but that "reasonable jurists could debate whether the motion should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." GA45-GA46 (internal ellipse and brackets omitted).

Summary of Argument

The petitioner's claim on appeal fails for two reasons. First, the claim has been procedurally defaulted. The petitioner did not allege a constitutional violation before the district court or suggest any remedy other than the one suggested by co-counsel, *i.e.*, that the court instruct the jury not to take home the instructions again. The petitioner likewise failed to allege any violation on direct appeal, despite raising eight claims, some of which were directed either at the instructions themselves or the conduct of the district court during the trial. As a result, on habeas review, he must show cause for failing to raise the claim, and prejudice stemming from the alleged error, and he has failed to make this showing.

Second, as the district court concluded, though it failed to follow proper procedures both in addressing a jury note without consulting the parties and in allowing the jurors to take home the charge for one night, there is no evidence to suggest that this decision impacted or prejudiced the petitioner at all. The jury brought home the exact charge given to them by the court, and the court did not provide the jury with any additional instructions. The court instructed the jury not to discuss the case with anyone and, upon request from a co-defendant's defense counsel, prohibited the jury from bringing home the charge again. Moreover, this occurred after the

first full day of deliberations and at the very beginning of what would end up being eight days of deliberations. The jury never expressed an inability to reach a verdict, and it is impossible to understand how the district court's *sua sponte* decision undermined the petitioner's right to a fair trial.

Argument

I. The petitioner's habeas claim that the district court violated his constitutional rights by allowing the jury to bring home the jury charge for one night at the start of deliberations fails both because it has been procedurally defaulted and because the decision did not prejudice him in any way

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts above.

B. Governing law and standard of review

1. Habeas corpus relief

To obtain collateral relief under 28 U.S.C. § 2255, an aggrieved defendant must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Section 2255 essentially codifies the common-law writ of habeas corpus in rela-

tion to federal criminal offenses. *United States v. Hayman*, 342 U.S. 205 (1952) (describing history of § 2255). Habeas corpus relief is an extraordinary remedy and should only be granted where it is necessary to redress an error that, were it left intact, would constitute "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). The strictness of this standard embodies the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their] finality." *Ciak v. United States*, 59 F.3d 296, 301 (2d Cir. 1995); *see also Strickland v. Washington*, 466 U.S. 668, 693 (1984) (recognizing the "profound importance of finality in criminal proceedings").

"[N]ot every asserted error of law can be raised on a § 2255 motion." *Napoli v. United States*, 32 F.3d 31, 35 (2d Cir. 1994), *amended on reh'g on other grounds*, 45 F.3d 680 (2d Cir. 1995) (internal quotation marks omitted). "The grounds provided in section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited, and it has long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (internal quotation marks omitted). "[R]elief is available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing

court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* (internal quotation marks omitted). "Constitutional errors will not be corrected through a writ of habeas corpus unless they have had a 'substantial and injurious effect,' that is, unless they have resulted in 'actual prejudice.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 637-38 (1993)).

"A motion under § 2255 is not a substitute for an appeal." *Zhang v. United States*, 506 F.3d 162, 166 (2d Cir. 2007) (quotation marks and citations omitted). If a petitioner "failed properly to raise his claim on direct view, the writ [of habeas corpus] is available only if the petitioner establishes 'cause for the waiver and shows 'actual prejudice' resulting from the alleged . . . violation.'" *Reed v. Farley*, 512 U.S. 339, 354 (1994). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel's efforts to comply with the . . . procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (internal quotation marks omitted). To demonstrate prejudice, the petitioner must show "there is a reasonable probability that the result of the trial would have been different" if not for the alleged error. *See Strickler v. Greene*, 527 U.S. 263, 289 (1999) (internal quotation marks omitted).

"A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition *de novo*." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004); *Coleman v. United States*, 329 F.3d 77, 81 (2d Cir. 2003). To the extent that the district court's decision relies on findings of historical fact, those findings are upheld unless clearly erroneous; to the extent that the court's decision relies on conclusions of law, those conclusions are reviewed *de novo*. *United States v. Harrington*, 689 F.3d 124, 129 (2d Cir. 2012).

2. The right to be present

Under Federal Rule of Criminal Procedure 43, a defendant in a criminal case must be present at:

> (1) the initial appearance, the initial arraignment, and the plea;
>
> (2) every trial stage, including jury impanelment and the return of the verdict; and
>
> (3) sentencing.

Fed. R. Crim. Proc. 43(a).

The right to be present at "every trial stage" is rooted in the Sixth Amendment's Confrontation Clause and the Fifth Amendment's Due Process Clause. *See United States v. Collins*, 665 F.3d 454, 459 (2d Cir. 2012) (citing *United States v. Canady*, 126 F.3d 352, 360 (2d Cir. 1997)). "The right to be present has been ex-

tended to require that messages from a jury should be disclosed to counsel and that counsel should be afforded an opportunity to the heard before the trial judge responds." *Id.* (quoting *United States v. Mejia*, 356 F.3d 470, 474 (2d Cir. 2004); *see also Ronder*, 639 F.2d at 934.

The "proper practice" for addressing "jury inquiries" is the following:

> (1) the jury inquiry should be in writing; (2) the note should be marked as the court's exhibit and read into the record with counsel and the defendant present; (3) counsel should have an opportunity to suggest a response, and the judge should inform counsel of the response to be given; and (4) on the recall of the jury, the trial judge should read the note into the record, allowing an opportunity to the jury to correct the inquiry or to elaborate on it.

Collins, 665 F.3d at 460 (quoting *Mejia*, 356 F.3d at 475).

"It is well-settled . . . that an *ex parte* communication by a judge to a jury in response to a jury inquiry may be considered harmless error where the communication cannot be said to have prejudiced the defendant." *Mejia*, 356 F.3d at 476 (citing *United States v. Adeniji*, 31 F.3d 58, 65 (2d Cir. 1994)); *see also*, *United States v. Henry*, 325 F.3d 93, 106-108 (2d Cir. 2003) (holding

that failure to afford defense counsel an opportunity to review an *Allen* charge before administering it to the jury did not constitute prejudicial error); *United States v. Ballistrea*, 101 F.3d 827, 837 (2d Cir. 1996) (holding that a judge's *ex-parte* response was non-prejudicial because it largely concerned administrative matters). "There is some conflicting authority regarding the standard of review applicable to the harmless error analysis." *Collins*, 665 F.3d at 460. In *United States v. Fontanez*, 878 F.2d 33, 37-38 (2d Cir. 1989), the Court "stated that a violation of a defendant's right to be present is not harmless if his absence created any reasonable possibility of prejudice." *Collins*, 665 F.3d at 460 (internal quotation marks omitted). But in other instances, the Court has "analyzed this type of case under a more deferential standard: whether the court can say with fair assurance that the judgment was not substantially swayed by the error." *Id.* at 461 (internal quotation marks omitted).

C. Discussion

1. This claim was never raised before and, therefore, is procedurally defaulted

At the outset, it bears note that, although the government raised a procedural default claim in its § 2255 opposition memorandum, it did not direct that argument to the petitioner's claim regarding whether the district court permitted the jury to take home the charge. GA112-GA114.

The government's brief response to this third claim, which the petitioner made without any citation to the record, was based on its mistaken belief that the facts alleged by the petitioner in the § 2255 motion were not accurate and not supported by the record. As a result, the district court resolved this issue on its merits and without addressing any claim of procedural default. Generally, this Court will not consider a procedural default argument raised for the first time on appeal. *See United States v. Canady,* 126 F.3d 352, 359-360 (2d Cir. 1997).

But this rule is not absolute. This Court does have the discretion to consider such an argument based on its concern for "protecting the finality of federal criminal judgments" and where no additional fact finding would be necessary. *See Rosario v. United States*, 164 F.3d 729, 732-733 (2d Cir. 1998).

It is undisputed that the petitioner failed to raise previously the claim he now raises. In particular, a plain reading of the trial transcript from April 17, 2003 reveals that, although the petitioner objected to the fact that the district court had allowed the jury to bring home the charge the night before, he never made any request for relief. He did not claim that his constitutional rights were violated; he did not move for a mistrial; he did not ask for any cautionary or limiting instruction; he did not ask the court to make any inquiry of the jury as a whole or indi-

vidually regarding whether they followed the court's instruction not to talk about the case with anyone. In fact, he did not even ask the court to instruct the jury to refrain from bringing home the charge again. This request came from a co-defendant's counsel and was granted by the court. Given the length of this trial, and the number of objections raised throughout the course of it, the fact that the petitioner failed to raise the issue until now is a significant bar to review.

Moreover, the petitioner made no mention of this issue on direct appeal. He raised eight separate issues, including specific challenges to the district court's jury instructions, claims of prosecutorial misconduct and, most significantly, allegations that the district court itself committed misconduct in its "rigorous questioning" of a government witness. He made no claim, however, regarding the manner in which the court handled the April 16, 2003 jury request to bring home the charge.

It is well-settled that a § 2255 motion cannot serve as a direct appeal. *See Zhang*, 506 F.3d at 166. To survive procedural default, the petitioner must show both "cause" for his failure to raise the claim, and "prejudice" stemming from the Court's failure to consider it. *See Reed*, 512 U.S. at 354. He has done neither.

There is no cause for the petitioner's failure to raise this claim before the trial court, or, at a

minimum, before this Court on direct appeal. The claim was certainly known to the petitioner and his counsel. The case law relevant to the claim, which is cited in the petitioner's reply memorandum for the § 2255 motion and the district court's decision, was certainly well-settled. In fact, had the petitioner raised the claim with the district court, the court may have reacted in a way which minimized any concern over potential prejudice. After all, when co-counsel requested that the court instruct the jury not to take the charge home anymore, the court readily complied. Had the petitioner requested an additional cautionary instruction or some other procedure, there is no reason to infer that the court would not have similarly accommodated him.

In addition, the petitioner has failed to establish how he has been prejudiced by the alleged violation. There is no evidence to support the contention that the jury did anything improper with the charge. The charge itself was identical to the charge that the court provided to the jury at the conclusion of the case. The court instructed the jury not to discuss the case with anyone when they concluded deliberations on that first full day. The deliberations themselves lasted eight days, making it very difficult to conclude that the act of allowing the jury to take home the charge only on that first day of deliberations had any impact at all. And the jury never expressed any hesitation in reaching a verdict. Based on

this record, it is impossible to conclude that the district court's decision, without input from the parties, to allow the jury to take home the charge prejudiced the petitioner.

Thus, to the extent that this Court exercises its discretion and reaches the procedural default argument despite the government's failure to raise it before the district court, the petitioner cannot satisfy the cause and prejudice standard for obtaining collateral review.

2. The district court's failure to follow Rule 43 was harmless

The petitioner argues that he was denied a fair trial when the district court failed to follow proper procedures both in responding to a jury note without first consulting with defense counsel and in permitting the jury to take home the jury charge for one night. He further claims that the district court erred in concluding that its actions amounted to non-prejudicial error. He alleges instead that the court's error was not "harmless beyond a reasonable doubt." *Chapman v. United States*, 386 U.S. 18, 24 (1967).

The petitioner's claim of prejudice is without merit. Throughout the jury's lengthy deliberations in this case, the district court used the proper procedures for responding to jury inquiries, as outlined by this Court in *Ronder*, 639 F.2d at 934. Indeed, prior to excusing the jurors to begin their deliberations, the court instructed

them that all communications with the court should be reduced to writing and that this was done to ensure that all communications between the court and the jury would "be on the record." GA131. During the eight days that the jury deliberated, it sent a total of seventeen notes to the court. GA48. The court marked all of these notes as exhibits and, with the exception of the note seeking permission to bring home the charge (Court Ex. 14), it consulted with counsel prior to responding to the inquiries. GA48-49; Tr.4/21/03 at 3-7; Tr.4/22/03 at 3-23; Tr.4/23/03 at 3-9; Tr.4/24/03 at 3-4, 6, 9. So this is not a situation in which the district court flagrantly disregarded the well-established procedures first detailed in *Ronder*. To the contrary, it substantially complied with those procedures.

Moreover, the inquiry at issue came early in the deliberation process, which can be a determinative factor in weighing prejudice. *See Collins*, 665 F.3d at 463 (jury returned verdict only one day after district court's *ex parte* conference with juror); *Mejia*, 356 F.3d at 477 (jury returned verdict fifty minutes after improper instruction given). The jury in this case sent the note asking if it could take home a copy of the jury instructions at the end of the first full day of deliberations and deliberated for an additional six days before returning guilty verdicts. GA30, GA33, GA47, GA52. Because the jury had just begun deliberations in the case, the court's re-

sponse to the jury's inquiry did not take on the "added significance" that a court's response necessarily takes on at a more "critical stage" of the deliberations. *Ronder*, 639 F.2d at 934. Likewise, unlike in *Ronder*, the jury here showed no signs of experiencing difficulty carrying out its duty, or reaching a verdict.

In addition, the jury's inquiry, as well as the district court's response, did not involve a new question of law. The jury simply asked, "May we take the charge home?" GA47. It did not ask for additional jury instructions or for explanation of one of the instructions already given. It did not advise the court of any difficulty in reaching a verdict. The jury's question was a simple, straightforward request, and the district court responded in kind by permitting each juror to take home his or her copy of the charge. GA52. As the district court explained in its ruling denying the § 2255 motion, unlike in *Ronder*, "in the present case, the judge did not issue any additional or different instructions," but "simply allowed the jurors to take home a copy of the original jury charge." GA42. The court "did not make any substantive change or offer supplemental instructions." GA43.

Finally, as the district court emphasized in its ruling, it took "proper precautions" to ensure that there was no prejudice to the petitioner. GA44. The court "warned the jurors not to conduct independent legal research and not to dis-

cuss the case with any one." GA44, GA52. The jury "assured" the court that it would follow these instructions. GA52. And, when counsel objected, the court instructed the jury that it should not take the charge home again, explaining that "by now you probably read through it enough to be aware of what's involved, and you will have the charge in there with you when you continue." GA92. As a result, the jury was only permitted to take the charge home for one night during the eight days of deliberation.

In the end, the district court's analysis in rejecting the habeas petition was correct. Although it "strayed from proper procedure, the decision to allow jurors to take home a copy of the original charge did not constitute prejudicial error." GA44. In making this decision, it appropriately relied on *Ulloa*, 882 F.2d at 45, in which the trial judge had repeatedly responded to oral inquiries from the jury without consulting the attorneys. *Id.* Though this Court warned in *Ulloa* that the better practice would be for the trial judge to require the jury to reduce all its questions to writing and to consult with counsel before responding to those inquiries, it also held that a trial judge must be afforded some latitude in responding to jury inquiries and that, where the responses to the oral inquiries do not misstate the law, the error is not prejudicial. *Id.*

Likewise, in this case, although the better practice certainly would have been for the dis-

trict court to have consulted with counsel before permitting the jury to take home a copy of the charge, any error was harmless because the court did not misstate the law, provide additional instructions or give the jury any substantive information at all. The jury was only permitted to have the charge at home for one night and was cautioned not to discuss the case with anyone. The jury went on to deliberate for six days before returning a verdict and found petitioner guilty on all counts without any signs of difficulty. Thus, the petitioner's claim that the jury's mind was swayed by having a copy of the jury charge is unsupported by the record, and any error in this case was harmless under either the "fair assurance" or the "harmless beyond a reasonable doubt" standards. *Collins*, 665 F.3d at 460. Accordingly, the district court properly denied petitioner's § 2255 motion.

Conclusion

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

Dated: March 27, 2013

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,889 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5 or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.