

To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN MARIANA ISLANDS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY P. VILLAGOMEZ,
JOAQUINA V. SANTOS, and JAMES
A. SANTOS,

Defendants.

Criminal Case No. 08-00020

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER
DENYING MOTION TO SETTLE
RECORD**

TABLE OF CONTENTS

<i>I. INTRODUCTION</i>	2
<i>A. The Motion To Settle Record</i>	2
<i>B. The Motion To Reconsider</i>	4
<i>II. LEGAL ANALYSIS</i>	5
<i>A. Authority To Reconsider</i>	5
<i>B. Grounds For Reconsideration</i>	7
<i>1. Failure to wait for defendants' reply</i>	7
<i>2. Failure to grant a proper Rule 10(e) motion</i>	9
<i>a. Failure to follow the plain meaning of the rule</i>	9
<i>b. Improper consideration of the merits</i>	14
<i>c. Failure to conduct further proceedings</i>	17
<i>III. CONCLUSION</i>	19

I blew it! Even judges sometimes need more than one bite at the apple to get things right. Fortunately, the defendants here were sufficiently persistent in their efforts to supplement the record on appeal to give this court another bite at the apple to determine whether or not supplementation of the record pursuant to Rule 10(e)(1) of the Federal Rules of Appellate Procedure is appropriate on the question of whether or not the trial judge, who has since taken senior status and moved to the mainland, closed jury selection to the public. This Motion For Reconsideration is a superb reminder of the important role such a motion can play in judicial decision-making. The defendants, including the former lieutenant governor of the Commonwealth of the Northern Mariana Islands, who were convicted in a high-profile case of conspiracy to defraud the United States, wire fraud, theft from a program receiving federal funds, and bribery, assert that the court's prior order denying their Rule 10(e)(1) motion was flawed, because it was filed before their reply brief was due; was based on a misperception of the nature and scope of the court's authority under Rule 10(e)(1); and improperly relied on the court's disbelief of their claim that jury selection was closed to the public. The court now gives due consideration to each of the defendants' grounds for reconsideration and, in the process, renewed consideration to when supplementation of the record pursuant to Rule 10(e)(1) is appropriate.

I. INTRODUCTION

A. The Motion To Settle Record

On July 23, 2010, the defendants filed a Motion To Settle Differences Re: Relevant District Court Order(s) And Events And To Conform Record Accordingly (Motion To Settle Record) (docket no. 405), in which the defendants asserted that the present record does not reflect that members of the public were entirely excluded from jury selection. The defendants asked the court to (1) consider eight declarations accompanying their

motion—from a court security officer and seven members of the defendants’ or the defendants’ attorneys’ families—averring that no one but defendants, attorneys, and potential jurors were allowed in the courtroom during jury selection; (2) permit further briefing and conduct further proceedings as appropriate to determine what truly occurred in the district court insofar as the question of public exclusion from the jury voir dire is concerned; and (3) conform the record accordingly.

By Order (docket no. 406) dated July 26, 2010, the court directed the prosecution to file an expedited response to the defendants’ Motion To Settle Record by August 2, 2010. The prosecution filed its Opposition To Motion To Correct Record (docket no. 407) on August 1, 2010. The court deemed the matter fully submitted after receiving the prosecution’s Opposition, *i.e.*, without waiting for a reply from the defendants.

In a Memorandum Opinion And Order Regarding Defendants’ Motion To Settle Record (docket no. 406), filed August 6, 2010, the court denied the defendants’ Motion To Settle Record. The court determined that no hearing was required on the defendants’ Motion, because Rule 10(e)(1) is inapplicable. The court reasoned that the evidence that the defendants here seek to insert into the record is nothing like a written order that conformed to a previous oral order; it is, instead, entirely new evidence. More specifically, the court concluded that the defendants were improperly attempting to inject into the record new material to facilitate a collateral attack on the verdict. The court found from the identity of the affiants that the defendants must have known of the purported total exclusion of the public from jury selection when it occurred and that the defendants’ failure to make any complaint about it for more than a year made it difficult to give much credence to the defendants’ eleventh hour contention that the public was totally excluded from jury selection. However, the court did not deny the defendants’ Motion To Settle Record on the ground that the claim was not credible. Rather, the court stated that, in

addition to finding Rule 10(e)(1) inapplicable, it would also deny the defendants' Rule 10(e) motion on the ground that, at the very least, the defendants either knew or should have known *at the time of trial* of the issue on which they now sought supplementation of the trial record, and could have made a record on the issue at that time.

B. The Motion To Reconsider

This case is before the court on the defendants' August 20, 2010, Motion For Reconsideration Of District Court's Order Denying Motion To Settle Record Pursuant To Fed. R. App. Pro. Rule 10(e)(1) (Motion For Reconsideration) (docket no. 410). By Order (docket no. 411), dated August 23, 2010, the court set expedited deadlines for the prosecution's response (due August 27, 2010) and the defendants' reply (due September 1, 2010), and set the Motion For Reconsideration for telephonic oral arguments on September 3, 2010. The prosecution filed its expedited Response (docket no. 412) as required on August 27, 2010, and the defendants filed their expedited Reply (docket no. 413) as required on September 1, 2010.

Despite a deadline of August 27, 2010, for attorneys wishing to participate in the oral arguments to notify the undersigned's judicial assistant of their contact information, which was clearly set out in the August 23, 2010, Order (docket no. 411), only two attorneys, Mr. O'Malley for the United States and Mr. Horgan for defendant Villagomez, met that deadline. Belatedly, in e-mails dated September 1 and 2, 2010, Mr. Quichocho, Mr. Torres, and Mr. Lujan informed the undersigned's judicial assistant that they wished to participate in the telephonic hearing and expressed a desire to do the hearing by video teleconference, so that members of the defendants' families could also "participate." At the court's direction, the undersigned's judicial assistant e-mailed all of the attorneys that the three attorneys who failed to timely respond to the court's order had waived their right

to participate and that, owing to the extremely late request for a video teleconference to accommodate family members, that request was denied. Also at the court's direction, the undersigned's judicial assistant advised the attorneys that, because the court wanted the hearing to be as complete as possible, the court would nevertheless call Mr. Quichocho, Mr. Torres, and Mr. Lujan at the numbers provided (albeit late) to include them in the conference call.■¹

The court heard telephonic oral arguments on the Motion For Reconsideration as scheduled on September 3, 2010. The prosecution was represented at the oral arguments by Assistant United States Attorney Eric O'Malley. Defendant Timothy Villagomez was represented by Donald M. Horgan of Riordan & Horgan in San Francisco, California, who took the lead in the arguments for all defendants, and by David Lujan of Lujan, Aguigi & Perez, L.L.P., in Hagatna, Guam. Defendant James Santos was represented by Victorino DLG Torres of Torres Brothers, L.L.C., in Saipan. Defendant Joaquina Santos was represented by Ramon K. Quichocho of the Law Offices of Ramon Quichocho, L.L.C., in Saipan.

II. LEGAL ANALYSIS

A. Authority To Reconsider

The defendants cite no authority or standards for a district court's reconsideration of a prior, non-dispositive order. Nevertheless, the Ninth Circuit Court of Appeals has

¹At the oral arguments, the court also explained that, had the parties given the court even a few days notice, keeping in mind the time difference between Saipan and Iowa, the court would have gladly accommodated a request to hold the oral arguments by video teleconference, so that members of the public could observe the proceedings. The defendants' notice in this case, however, was simply too late to be accommodated.

recognized that a district court has inherent authority to rescind an interlocutory order over which it has jurisdiction. *See, e.g., City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001). Moreover, like other courts, the Ninth Circuit Court of Appeals is willing to construe a motion “to reconsider” as a motion for relief from an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *See, e.g., Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441-42 (9th Cir. 1991) (a motion to reconsider could be construed as a Rule 60(b) or a Rule 59(e) motion, even when the movant brought it under local rules and cited no governing Federal Rule of Civil Procedure).

Rule 60(b) provides, in pertinent part, that “the court may relieve a party . . . from a final judgment, order, or proceeding” for specified reasons, including “any other reason that justifies relief.” FED. R. CIV. P. 60(b). “Rule 60 is ‘remedial in nature and . . . must be liberally applied.’” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). Even so, rulings on motions to reconsider pursuant to Rule 60(b) are reviewed only for abuse of discretion. *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010). “A district court abuses its discretion by denying relief under Rule 60(b) when it makes an error of law or relies on a clearly erroneous factual determination.” *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (citing *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000)). The court believes that the defendants’ assertion that the court “misperceived the nature and scope of its authority under Federal Rule of Appellate Procedure 10(e)(1)” is, at least primarily, an assertion that the court made an error of law in denying their Motion To Settle Record. The court will, therefore, consider whether it should set aside its denial of that motion.

B. Grounds For Reconsideration

The defendants' specific grounds for reconsideration are the following: (1) the court denied their Motion To Settle Record before their deadline to file a reply brief, and (2) the court failed to grant their Motion To Settle Record when it was appropriate to do so, because (a) supplementation of the record was appropriate under the plain terms of Rule 10(e)(1); (b) the court has the authority to take declarations and conduct further proceedings as appropriate to resolve the parties' differences; and (c) the court may not decline to settle the record simply because the court rejects the movants' underlying claim on the merits or does not find it credible. The court will consider each of these contentions in turn, although not necessarily in the order that the defendants presented them.

1. Failure to wait for defendants' reply

The defendants' first complaint is that the court issued its order denying their Motion To Settle Record before the deadline for their reply brief. They contend that, pursuant to Civil Local Rule 7.1(c)(3), applicable in this criminal case pursuant to Criminal Local Rule 12.1, they had until the close of business on the "Thursday in the week following the week in which the opposition was filed" to file their reply. They point out that the prosecution's Opposition was filed on Monday, August 2, 2010, so that they should have had until Thursday, August 12, 2010, to file their reply, but the court issued its order denying their Motion To Settle Record on August 6, 2010. As a consequence, they contend that the court may have failed to consider significant authority that undermined the prosecution's arguments, which they contend the court largely adopted. The prosecution does not address the defendants' contention that the court should have waited until the defendants filed their reply brief before ruling, but does contend that none of the authority now cited by the defendants in their Motion For Reconsideration requires a different result.

The court believes that the defendants reasonably could have been expected to file an expedited reply or to have requested a deadline for an expedited reply, where the court had directed the prosecution to file an expedited response in an Order (docket no. 406), filed July 26, 2010. *Cf. Potter v. West Side Transp., Inc.*, 188 F.R.D. 362, 362 (D. Nev. 1999) (because the defendants sought expedited consideration of a motion to compel, the court decided to proceed without waiting for a reply). Moreover, such an expedited reply would have been appropriate in light of the circumstances of this case, which involved a stay of appellate proceedings by the Ninth Circuit Court of Appeals to allow the defendants to seek appropriate relief to supplement the record. Indeed, the defendants might be deemed to have waived their contention that the court should have awaited their reply, because they filed no reply brief by the deadline established by the Local Rules and waited another *eight days* after that deadline to file their Motion For Reconsideration.

On the other hand, it would have been prudent for the court either to await the defendants' reply or to set an expedited deadline for such a reply, as the court did for the briefing of the defendants' Motion For Reconsideration. *See Duha v. Agrium, Inc.*, 448 F.3d 867, 881 (6th Cir. 2006) ("The district court should have waited to deny the motion until after the deadline to file the reply brief had passed. Had it done so, the district court's denial of this motion would have been unquestionably proper. Nevertheless, Agrium's reply brief did not say anything important that had not already been presented to the district court in Agrium's May 18th motion to supplement the record," so that the district court did not abuse its discretion in denying the motion.). In the absence of an order for an expedited reply, the court ruled on the defendants' Motion To Settle Record before a reply was due under the local rules. *See DNMI Civil Local Rule 7.1(c)(2)* (oppositions must be filed by the close of business on the Thursday of the second full week after the week in which the motion was filed). Assuming that doing so was an error of law

warranting reconsideration of the order denying the defendants' Motion To Settle Record, *see Lemoge*, 587 F.3d at 1192 (“A district court abuses its discretion by denying relief under Rule 60(b) when it makes an error of law or relies on a clearly erroneous factual determination.”), the remedy for “jumping the gun” with the original ruling on the defendants' Motion To Settle Record is for the court now to give due consideration to the additional authorities and arguments offered by the defendants in their Motion For Reconsideration, which the defendants contend undermine the prosecution's position, *i.e.*, the authorities that presumably would have been cited in any reply brief.

2. *Failure to grant a proper Rule 10(e) motion*

As noted above, the defendants' argument that the court improperly failed to grant their Motion To Settle Record on the merits has three prongs: (a) supplementation of the record was appropriate under the plain terms of Rule 10(e)(1); (b) the court has the authority to take declarations and conduct further proceedings as appropriate to resolve the parties' differences; and (c) the court may not decline to settle the record simply because the court rejects the movants' underlying claim on the merits or does not find it credible. The court will consider each these arguments, although not in the order the defendants presented them.

a. *Failure to follow the plain meaning of the rule*

The defendants argue that Rule 10(e)(1) plainly allows the district court to supplement the record in order to settle a difference about whether the court was closed to all members of the public during jury selection, because the difference is about what occurred in the district court in pretrial proceedings. They contend that their desire to establish that the district court issued an order barring all members of the public from the courtroom during jury selection and that all members of the public were, in fact, barred from the courtroom at that time is a desire for precisely the clarification of “what occurred

in the district court” that the rule was meant to permit. Thus, they contend that this court’s conclusion that Rule 10(e)(1) is inapplicable here was incorrect. The prosecution argues that what the defendants seek is plainly outside the scope of the rule, because the defendants are trying to build a new record of an alleged event for which there is not the slightest hint on the existing record. The prosecution contends that the defendants are improperly trying to start an entirely new line of inquiry. In their reply, the defendants assert that they are properly trying to build a record concerning an event that *did* occur in the district court, the exclusion of the public during jury selection, but which is not reflected in the record. They contend that anything added to the record pursuant to Rule 10(e)(1) is “new” in some sense, so that its “newness” is not a ground for excluding it.

As this court noted in its prior ruling, Rule 10(e) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

FED. R. APP. P. 10(e)(1). While this rule seems clear enough on its face, case law concerning the limitations imposed upon the scope of Rule 10(e)(1) perhaps does more to muddy than to clarify the meaning of the rule.

The Ninth Circuit Court of Appeals has observed, “The district court may not use Federal Rule of Appellate Procedure 10(e) to supplement the record with material not introduced or with findings not made.” *United States v. Garcia*, 997 F.2d 1273, 1278 (9th Cir. 1993). This broad exclusion from Rule 10(e)’s scope may all but swallow the rule, as it would appear to preclude—and the prosecution argues that it does

preclude—supplementation of the record with any finding, order, or direction by the court that is not reflected or at least hinted at in the existing record. Yet, a Rule 10(e) situation arises in precisely the circumstances that one party argues that the record does not “truly disclose[] what occurred in the district court,” such as whether or not the court gave a particular order or direction or made a particular finding. While *Garcia* places out of bounds “material not introduced or findings not made,” the court does not read *Garcia* to place out of bounds *whether or not* a ruling was made or an order was given. Similarly, the Seventh Circuit Court of Appeals has explained that “[t]his rule is meant to ensure that the record reflects what really happened in the district court, but ‘not to enable the losing party to add new material to the record in order to collaterally attack the trial court’s judgment.’” *United States v. Banks*, 405 F.3d 559, 567 (7th Cir. 2005) (quoting *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001)). As the defendants point out, however, anything added to the record pursuant to Rule 10(e)(1) is, necessarily, “new,” in that it clarifies something that the record did not “truly” or adequately disclose, and “new” evidence of “what occurred in the district court” should not be barred, merely because a showing of what occurred in the district court may permit an attack on a defendant’s conviction on a basis *other than* his or her substantive guilt.

As the defendants contend, perhaps more clarity has been provided by the Fifth Circuit Court of Appeals, which explained that Rule 10(e) does not countenance an attempt to have the district court change what went on below or a request for further substantive proceedings by the district court to make additional findings on a disputed issue, but Rule 10(e) is properly used to admit the trial court’s statement of an important portion of the actual trial that had not been recorded by the court reporter, or to include a description of events and circumstances, including those of a non-verbal nature, that took place during a trial. See *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981) (comparing

Marron v. Atlantic Refining Co., 176 F.2d 313 (1949), *cert. denied*, 339 U.S. 923 (1950), and *Cockrell v. Ferrier*, 375 F.2d 889 (5th Cir. 1967), with *United States v. Smith*, 493 F.2d 906 (5th Cir. 1974), and *United States v. Lockwood*, 604 F.2d 7 (5th Cir. 1979)). As the Fifth Circuit Court of Appeals explained,

The distinction to be made is a tolerably fine one, but real: What in fact went on below may be settled and placed of record pursuant to Rule 10(e) and whatever proceedings are necessary to that end are permissible. New proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the reach of the rule. Settling what went on at [a] pre-trial conference falls in the former category.

Page, 661 F.2d at 1082. Thus, the difference is between settling the record as *to what happened* in the district court and new *substantive proceedings* to fill a gap in what might have been done, but was not.

Although this court perhaps should have understood these defendants' request sooner, it was not until the oral arguments on the Motion For Reconsideration that it became clear to the court that the defendants were asking the court to supplement the record to resolve a "difference" about whether the record truly discloses "what occurred in the district court," that is, whether or not the district court closed jury selection to the public and whether those proceedings were, in fact, closed to the public, not to offer new evidence, of a substantive nature, to collaterally attack their convictions. Understood in this way, the affidavits upon which the defendants' relied in their Motion To Settle Record are not "new" evidence *of a substantive nature*, but evidence of "what occurred in the district court." To put it another way, their request is for the court to determine "[w]hat in fact went on below," whether an order was given and whether jury selection was closed, rather than "to supply what might have been done but was not," that is, an attempt to

insert into the record after the fact a challenge to closure of jury selection that was not made or to insert into the record the affidavits on which they rely to show what purportedly happened in the trial court. *Id.*

The court also now finds much more persuasive the defendants' attempt to liken their circumstances to the circumstances in *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993), in which the Ninth Circuit Court of Appeals allowed supplementation of the record. The court now agrees that the defendants, like the movant in *Garcia*, are simply attempting to use the procedure authorized by Rule 10(e)(1) to settle a dispute about what occurred in proceedings before the district court. In *Garcia*, the Ninth Circuit Court of Appeals concluded that the district court had properly supplemented the appellate record with a written order on the defendant's motion to suppress that conformed to its telephonic denial of the defendant's motion to suppress in light of its failure to enter a written order at the time. *Id.* at 1278-79. Similarly, what the defendants here are trying to do is to supplement the appellate record with an unrecorded order or direction from the court to close jury selection to the public—if further Rule 10(e) proceedings demonstrate that such an order or direction was, in fact, given.

Whether or not the court “misperceived” the scope of Rule 10(e), it certainly “misperceived” the nature of the defendants' Motion To Settle Record, and, thus, misapplied Rule 10(e) and applicable case law, which the court believes was an error that warrants setting aside its decision on that motion. *See Lemoge*, 587 F.3d at 1192 (“A district court abuses its discretion by denying relief under Rule 60(b) when it makes an error of law or relies on a clearly erroneous factual determination.”). The court now reverses its prior conclusion that the defendants are improperly attempting to add new material to the record to collaterally attack the trial court's judgment and concludes, instead, that Rule 10(e)(1) *is* applicable to the defendants' request to supplement the record

to show whether or not the trial judge closed jury selection to the public and whether jury selection was, in fact, closed.

b. Improper consideration of the merits

The defendants also argue that the court improperly relied on its conclusion that it did not give much credence to the defendants' factual claim that the courtroom was closed during jury selection. They contend that the credibility of their factual claim is simply not a valid basis for denying a Rule 10(e) motion. They contend that, even if the court did not believe their allegations, it should have engaged in Rule 10(e) proceedings to settle the record for the benefit of the Court of Appeals. They also explain away their failure to raise the issue during the trial on the ground that trial counsel may simply not have been aware of the possibility of a legal claim under the circumstances, because their trial occurred before the Supreme Court's decision in *Presley v. Georgia*, 130 S. Ct. 712 (2010). They contend that their lack of a contemporaneous objection may limit review by the Court of Appeals to plain error, but does not absolve this court of the duty to clarify the record concerning what happened in the trial proceedings. The prosecution swings at this "pitch in the dirt" by arguing that the district court has the right to reject questionable claims and to decline to reopen the record based on claims that lack *prima facie* credibility. In reply, the defendants assert that the reason for the prosecution's vigorous attempts to keep the court from reopening the record is that the prosecution has no evidence that jury selection was open to the public to rebut their evidence that it was not. They note that the prosecutor has not even offered a declaration contrary to those they have offered, despite the prosecutor's participation in the trial.

The court does not agree with the defendants that its prior ruling denying their Motion To Settle Record was based on the court's view that their claim that the courtroom was closed to the public during jury selection was not credible. The court certainly did

note that, if a total exclusion of the public occurred during jury selection in the defendants' criminal trial on or about March 30, 2009, the defendants and their trial counsel knew or should have known of that total exclusion when it purportedly occurred, because the affiants that the defendants have now assembled, who allege that they were excluded from the courtroom during jury selection, include family members of the defendants and the wife of one of the defense attorneys who was assisting her husband in this case. The court also noted what objections the defendants did make at trial to the trial court's refusal to release to the general public seats reserved for students and the defendants' failure to raise the issue that they now assert at any time until a year after trial, and then only at the tail end of a hearing on a different claim that the public was excluded from the trial. The court also did state that, under these circumstances, it is difficult to give much credence to the defendants' eleventh hour contention that the public was totally excluded from jury selection.

However, the credibility problem with the defendants' eleventh hour claim was not the alternative ground on which the court denied that defendants' Motion To Settle Record. Rather, as the court plainly stated,

At the very least, the defendants either knew of should have known *at the time of trial* of the issue on which they now seek supplementation of the trial record, and could have made a record on the issue, which warrants denial of their Rule 10(e) motion. *Hillsberg*, 812 F.2d at 336 (affirming the district court's ruling that Rule 10(e) "does not allow the court to add to the record on appeal matters that might have been but were not placed before it in the course of the proceedings leading to the judgment under review"); *see also Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981) (denying, on reconsideration, the defendant's motion to supplement the record pursuant to Rule 10(e), where the defendant knew prior to trial of the existence of the grand jury testimony he sought

to add to the record on appeal, and that testimony was Jencks Act material, but the defendant did not request it, and the defendant knew of and had access to at the time of trial taped conversations that he sought to add to the record on appeal, but he did not introduce them into evidence at trial).

Memorandum Opinion And Order (docket no. 406) at 5. Thus, it was not the lack of credibility of the defendants' allegations that the court found warranted denial of their Motion To Settle Record, but their failure to make a record *at the time of trial* on the issue when they could have done so, because they knew or should have known of the pertinent circumstances.

The decisions in *Hillsberg* and *Anthony* may still stand as substantial, even insurmountable barriers to the defendants' attempt to supplement the record to show that the court closed jury selection to the public. This is so, because the defendants' failure to make a record *at the time of trial* about purported closure of the courtroom to the public during jury selection, if they knew or should have known of the issue, would also warrant denial of their Rule 10(e) motion. Indeed, the defendants still make no attempt, in their Motion For Reconsideration, to distinguish either *Hillsberg* or *Anthony* on this point. Nevertheless, the court believes that it may have been improper to *decide* whether or not the defendants knew or should have known of the closure of the courtroom to the public during jury selection at the time that the purported closure occurred, rather than to consider, in further Rule 10(e) proceedings, whether and why no contemporaneous objection to the purported closure was made. *See Lemoge*, 587 F.3d at 1192 ("A district court abuses its discretion by denying relief under Rule 60(b) when it makes an error of law or relies on a clearly erroneous factual determination."). Therefore, rather than reaffirm its prior conclusion that the defendants' failure to make a record *at the time of trial* concerning closure of jury selection to the public, when they knew or should have

known of the issue, also warrants denial of the Rule 10(e) motion, the court will set aside that conclusion, and consider in further Rule 10(e) proceedings whether or not the defendants' attempt to supplement the record is barred on this ground.

c. Failure to conduct further proceedings

The defendants spend a substantial portion of their Motion For Reconsideration on their contention that the court is authorized under Rule 10(e)(1) to take declarations and to conduct further proceedings as appropriate to resolve the parties' dispute. The court said nothing different in its order denying the defendants' Motion To Settle Record. Rather, the court noted, "The rule does not require the district court to hold an evidentiary hearing, only that it consider and settle the dispute." *United States v. Brika*, 416 F.3d 514, 530 (6th Cir. 2005). While the court found in its prior ruling that no hearing is required on the defendants' Motion To Settle Record, because the court found that Rule 10(e)(1) is inapplicable, the court now agrees with the defendants that further proceedings are necessary to settle the record as to whether or not the trial judge directed that the public be excluded from jury selection.

The prosecution makes much of its contention that essential questions about how such further proceedings would be conducted—including who witnesses might be, how they would be made to appear, who bears the burden of proof, and what that burden might be—have not yet been addressed, yet makes little effort to answer those questions. The court notes that, in *Page*, the Fifth Circuit Court of Appeals opined that "whatever proceedings are necessary" to settle the record "are permissible." *Page*, 661 F.2d at 1082. In *Page*, to determine "what occurred in the district court" during the pre-trial conference, "[t]he trial court conducted a hearing, with counsel for both sides present, and prepared a minute entry detailing what went on at the pre-trial conference." *Id.* at 1081-82. In *Garcia*, the district court resolved the question of the findings, conclusions, and

reasons for its telephonic denial of Garcia's motion to suppress by signing and entering a written order, prepared by the prosecution, denying Garcia's motion to suppress. *Garcia*, 997 F.2d at 1277.

While the Rule 10(e) proceedings used in *Page* and *Garcia* were sufficient to resolve the "differences" about "what occurred" at issue in those cases, the court agrees with the prosecution that, here, something more than a hearing with both sides present is required to resolve the factual dispute about whether or not the district court ordered or directed that jury selection be closed to the public and whether or not those proceedings were, in fact, closed to the public. This is true, in part, because the judge who presided at trial has since taken senior status and moved to the mainland, and would only be available to address what he did or did not order as a witness or by affidavit. What is required is an evidentiary hearing. Logically, the proponent of supplementation of the record bears the burden to prove that the district court ordered or directed that jury selection be closed to the public and that jury selection was, in fact, closed to the public. The court leaves to further briefing the question of whether that burden of proof must be higher than the preponderance of the evidence.

The undersigned also concludes that he can properly and should preside over such further proceedings. The undersigned will be in Saipan for a return engagement as a visiting judge in mid-November, just two months from now. Although another visiting judge might be available sooner, it is unlikely that any other judge, besides the trial judge, who is not immediately available and who may likely be a witness in the Rule 10(e) proceedings instead of presiding over them, is as familiar with this case as the undersigned. *See United States v. Villagomez*, 2010 WL 1726147 (decision by the undersigned on the defendants' motion for release pending appeal based on their contention that they were denied their right to a public trial when the district court declined to release

empty seats reserved for visiting students to members of the general public). Thus, no other visiting judge is likely to be able to enter a ruling settling the record sooner, even with a head start. Even though appellate proceedings will necessarily be delayed while the undersigned conducts Rule 10(e) proceedings, the ultimate disposition of the Rule 10(e) proceedings by the undersigned is likely to make the stay on appellate proceedings shorter than it might otherwise be. Moreover, a delay in the evidentiary hearing until November is not excessive, in light of the logistics involved in preparing for such a hearing, including the Marshal's arrangements to transport the defendants back to Saipan for the hearing and the parties' location and interviewing of witnesses and arrangements for their appearance at the hearing. The prosecution has also indicated a desire to call the trial judge as a witness or at least to obtain a statement from him concerning this matter, and should any party wish to call him as a witness, he is entitled to adequate notice of the proceedings and the opportunity to prepare. Therefore, the court will set an evidentiary hearing, below, during the undersigned's November visit to Saipan.

III. CONCLUSION

For the reasons stated here, the defendants' August 20, 2010, Motion For Reconsideration Of District Court's Order Denying Motion To Settle Record Pursuant To Fed. R. App. Pro. Rule 10(e)(1) (Motion For Reconsideration) (docket no. 410) is **granted**, to the extent that the court sets aside its August 6, 2010, Memorandum Opinion And Order Regarding Defendants' Motion To Settle Record (docket no. 406) denying the defendants' July 23, 2010, Motion To Settle Differences Re: Relevant District Court Order(s) And Events And To Conform Record Accordingly (Motion To Settle Record)

(docket no. 405), and sets an evidentiary hearing on the defendants' Motion To Settle Record for November 8, 2010, at 9:00 a.m.

IT IS SO ORDERED.

DATED this 7th day of September, 2010.

Handwritten signature of Mark W. Bennett in black ink.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA
VISITING JUDGE