

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 SETTLING RECORD ON
APPEAL**

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This matter is before the court following an evidentiary hearing to settle the record, pursuant to Rule 10(e)(1) of the Federal Rules of Appellate Procedure, on the question of whether or not jury selection was closed to the public and, if so, on whose order or authority or under what circumstances. These questions relate to the defendants' assertions, on appeal, that their constitutional rights were violated when members of the public were completely excluded from jury selection. Although the prosecution still disputes the applicability of Rule 10(e) to the questions presented here, it argues that the record, as developed at the evidentiary hearing, now shows that members of the public were admitted to the courtroom during jury selection, but if they were not, their exclusion was solely because the courtroom was filled to and beyond capacity with prospective jurors, who properly had priority for available seats. The defendants assert that the record now shows that no members of the public were admitted at any time during jury selection, even though seats became available as prospective jurors were excused. With the exception of my consideration of the applicable burden of proof, my role in these proceedings is strictly as the finder of fact concerning what happened; the legal implications of what happened are for the United States Court of Appeals for the Ninth Circuit in its disposition of the defendants' appeals.

I. INTRODUCTION

A. Background

On January 15, 2009, a Grand Jury handed down a First Superseding Indictment against three defendants: Timothy P. Villagomez, the former lieutenant governor of the Commonwealth of the Northern Mariana Islands (CNMI) and the former executive director of the Commonwealth Utilities Corporation, the semi-autonomous agency responsible for providing power and water to the people of the CNMI; James A. Santos, the former

Secretary of Commerce of the CNMI; and Joaquina V. Santos, the wife of James Santos and the sister of Timothy Villagomez. The First Superseding Indictment charged each of the defendants with conspiracy to defraud and to commit offenses against the United States, in violation of 18 U.S.C. § 371, wire fraud, in violation of 18 U.S.C. §§ 1343, 1346, and 2, and theft concerning a program receiving federal funds, in violation of 18 U.S.C. §§ 666(a)(1)(A) and 2. In addition, defendant Villagomez was charged with bribery concerning a program receiving federal funds, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2, and defendants James Santos and Joaquina Santos were charged with bribery concerning a program receiving federal funds, in violation of 18 U.S.C. §§ 666(a)(2) and 2.¹ A jury trial in this case before Chief United States District Court Judge Alex R. Munson began with jury selection on March 30, 2009, which continued into March 31, 2009. Presentation of evidence began on March 31, 2009, and ran for sixteen days. Closing arguments and submission of the case to the jury occurred on April 23, 2009. On April 24, 2009, the jury returned verdicts of guilty against all defendants on all charges. Verdict Form (docket no. 211). The defendants appealed.

After various proceedings in the appellate court and the district court, including attempts by the defendants to obtain bail pending disposition of their appeal, the defendants filed in this court on July 23, 2010, 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 that motion, the defendants asserted that the present record does not reflect that members of the public were entirely excluded from jury selection.

¹On August 8, 2008, before the First Superseding Indictment was handed down, a fourth defendant charged in the original Indictment, Anthony Guerrero, pleaded guilty to the charge of conspiracy to defraud and to commit offenses against the United States and was not recharged in the First Superseding Indictment. Guerrero has not appealed his sentence.

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.

Chief Judge Munson, the trial judge, stepped down as an active judge on February 28, 2010, and is now a senior judge. Therefore, this case was assigned to me, as a visiting judge. In a Memorandum Opinion And Order Regarding Defendants’ Motion To Settle Record (docket no. 406), filed August 6, 2010, I initially denied the defendants’ Motion To Settle Record, because I concluded that Rule 10(e)(1) was inapplicable, where I found that the defendants were improperly attempting to inject into the record new material to facilitate a collateral attack on the judgment against them. I also 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 barred their Rule 10(e) motion.

On August 20, 2010, the defendants filed a 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), on the following grounds: (1) I denied their Motion To Settle Record before their deadline to file a reply brief, and (2) I 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. In a Memorandum Opinion And Order Regarding Defendants' Motion For Reconsideration Of Order Denying Motion To Settle Record (docket no. 415), filed September 7, 2010, I concluded that I had blown it the first time by ruling on the Motion To Settle Record before the time had expired for the defendants to file any reply and by "misperceiving" the nature of the defendants' Motion To Settle Record as an attempt to add new material to the record to collaterally attack the trial court's judgment, and, thus, misapplying Rule 10(e) and applicable case law. On reconsideration, I found that Rule 10(e)(1) *is* applicable to the defendants' request, because it was a proper 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. I also reconsidered my conclusion that the defendants' failure to make a record *at the time of trial* on the issue of closure of jury selection, when they could have done so, because they knew or should have known of the pertinent circumstances, barred supplementation of the record pursuant to Rule 10(e). Instead, I noted that out-of-circuit decisions in *United States v. Hillsberg*, 812 F.2d 328 (7th Cir.), *cert. denied*, 481 U.S. 1041 (1987), and *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), upon which I had relied, 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, but that it was improper for me to decide that question rather than to consider, in further Rule 10(e) proceedings, whether and why no contemporaneous objection to the purported closure was made.

Because the parties needed more time to engage in some informal discovery and to identify and secure the testimony, by videotelephone conferencing or otherwise, of various witnesses, I set an evidentiary hearing on the defendants' Motion To Settle Record for November 8, 2010, at 9:00 a.m., during my return visit to Saipan as a visiting judge.

B. The Evidentiary Hearing

The evidentiary hearing on the defendants' Rule 10(e) motion was ultimately rescheduled to November 9 and 10, 2010. At the hearing, the prosecution was represented by Eric O'Malley, Assistant United States Attorney in Saipan. Defendant Timothy Villagomez was represented by Leilani Lujan of Lujan, Aguigui & Perez, L.L.P., in Guam; defendant Joaquina Santos was represented by Ramon K. Quichocho, of the Law Offices of Ramon Quichocho, L.L.C., in Saipan; and defendant James Santos was represented by Victorino Torres (Day 1) and Joaquin Torres (Day 2) of the Torres Brothers, L.L.C., in Saipan. The defendants waived their personal presence at the hearing.

The hearing involved testimony, by videotelephone conference (VTC) and "live," from numerous witnesses. More specifically, the prosecution presented testimony from the following witnesses: (1) Hon. Alex R. Munson, the trial judge, who has since taken senior status (by VTC); (2) Wolfgang Calvert, Deputy United States Marshal, formerly Deputy In Charge assigned to Saipan at the time of the trial in this case (by VTC); (3) Edwin Atalig, a Court Security Officer (CSO), who also worked in that capacity during the trial in this case; (4) Francisco Babauto, a CSO, who also worked in that capacity during the trial in this case; (5) Daniel Punzalan, Deputy United States Marshal, temporarily assigned to Saipan for the trial in this case (by VTC); (6) Jennifer Rippey, Deputy United States Marshal, temporarily assigned to Saipan for the trial in this case (by VTC); (7) Diego Tudela, a CSO, who also worked in that capacity during the trial in this case; (8) Ramon P. Agulto, a CSO, who also worked in that capacity during the trial in this case; (9) Don Vincent Fejeran, a CSO, who also worked in that capacity during the trial in this case; (10) Don Hall, Supervisory Deputy United States Marshal for Saipan, who also worked in that capacity during the trial in this case; (11) David Veasey, Deputy

United States Marshal, temporarily assigned to Saipan for the trial in this case (by VTC); (12) Rey Renguul, a contract guard during the trial in this case; and (13) Frances Quichocho, wife of and assistant to one of the defense attorneys during the trial. The defendants presented the testimony of the following witnesses: (1) Mateo Santos, a prospective juror in this case and a relative of a defendant; (2) Diego San Nicolas Dela Cruz, the supervising CSO during the trial in this case, although he is no longer employed by the court; (3) Amelia Villagomez Camacho, a prospective juror in this case and a relative of a defendant; (4) Juan P. Tenorio, a prospective juror in this case and a relative of a defendant; (5) Rebecca Tenorio, a relative of a defendant; and (6) Rowena Villagomez Aldan, a relative of a defendant.

II. THE BURDEN OF PROOF

As mentioned above, the one exception to my role as factfinder is my consideration of the applicable burden of proof. Relying on what it admits is at best persuasive authority—because there appears to be no case law involving determination of the record pursuant to Rule 10(e) by someone other than the trial judge—the prosecution asserts that the burden of proof in these proceedings should be on the defendants and that their burden should be higher than a preponderance of the evidence, that is, proof by at least “clear and convincing” evidence. This is so, the prosecution argues, because the claim was brought late, the record must be settled by a judge other than the trial judge, and the determinations must be based on testimony of persons who observed, but did not participate in the trial. Indeed, the prosecution argues that I should attach great weight to the trial judge’s testimony, and if he testifies that there was no closure, I should find that this is an accurate reflection of what truly occurred, absent a showing that the trial judge’s testimony is “intentionally false” or “plainly unreasonable.” The defendants counter that there is no

basis to give the trial judge's testimony any presumption of accuracy, where he has not, and will not, hear from any witnesses, such as prospective jurors, excluded members of the public, or members of the Marshal's office, in reconstructing what occurred. They argue that only my reconstruction, based on all of the evidence presented, is entitled to any presumption of correctness *by the appellate court*. They also contend that the prosecution has made no showing that they should be required to establish their claims concerning relevant events by anything more than a preponderance of the evidence.

As I noted in prior rulings on this matter in this case, 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). Although the rule provides that the district court must "settle" the record, it states no burden of proof or persuasion, placed on any party, applicable to doing so. Also, like the parties, I have found no case expressly considering these issues.

That said, placing the burden to show what truly occurred in the district court on the party asserting that the present record does not truly disclose what occurred would be consistent with the ordinary rule that the party asserting error on appeal bears the burden to make an adequate record of the error in the district court or to show that an unpreserved error was prejudicial, *see, e.g., United States v. Perez*, 475 F.3d 1110, 1113 (9th Cir. 2007) (the defendant bore the burden under a "clear error" analysis to show that an unpreserved error affected his substantial rights); *United States v. Foster*, 711 F.2d 871, 880 (9th Cir. 1983) (the party asserting error on appeal has the burden of proving such error, "'not by assertion, but by the record'" (quoting *L & E Co. v. U.S.A. ex rel. Kaiser*

Gypsum Co., 351 F.2d 880, 883 (9th Cir. 1965)), and consistent with the rule that the proponent of evidence bears the burden to show that it is admissible, *see, e.g., United States v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 904 (9th Cir. 2008) (“As the proponent of Sage’s expert testimony, Champion also has the burden to establish its admissibility.”); *United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000) (“As the proponent of the [allegedly non-hearsay] evidence, Chang had the burden to demonstrate th[e] foundational requirement[s].”); *United States v. Connors*, 825 F.2d 1384, 1390 (9th Cir. 1987) (the federal relevance rules place the burden of demonstrating admissibility on the proponent of evidence at trial). Thus, I am satisfied that whatever the applicable burden of proof may be to show what truly occurred in the district court, that burden rests on the defendants here, as they are the parties asserting that the trial record does not disclose that jury selection was, in fact, closed to the public.

What that burden is, however, is not clear, and I do not find the authorities cited by the prosecution for a burden of proof higher than the preponderance of the evidence to shed much light on the burden of proof in the present circumstances. As to the applicability of any presumptions, the prosecution is correct that the Ninth Circuit Court of Appeals has stated, “When the district court under Rule 10(e) settles a dispute about what occurred in proceedings before it, ‘the court’s determination is conclusive ‘absent a showing of intentional falsification or plain unreasonableness.’” *United States v. Garcia*, 997 F.2d 1273, 1278 (9th Cir. 1993) (quoting *United States v. Serrano*, 870 F.2d 1, 12 (1st Cir. 1989), in turn quoting *United States v. Mori*, 444 F.2d 240, 246 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971)). However, that standard of review applies to the *appellate* court’s review of the district court’s Rule 10(e) findings; in my view, it has nothing to do with *my* review of the testimony from the trial judge or any other witness in this Rule 10(e) proceeding.

Ultimately, however, I find that neither the burden of proof, nor who bears that burden, nor any presumption of correctness is dispositive of any factual finding that I could or would make on the present record: I would find the facts below, based on all of the evidence presented, whether the burden of proof or persuasion is by a preponderance of the evidence or by clear and convincing evidence, without regard to any presumptions of correctness or accuracy of any testimony, and without regard to whether one party or the other nominally bears the burden of proof or persuasion.

III. RULE 10(e) FINDINGS

A. Configuration Of The Premises

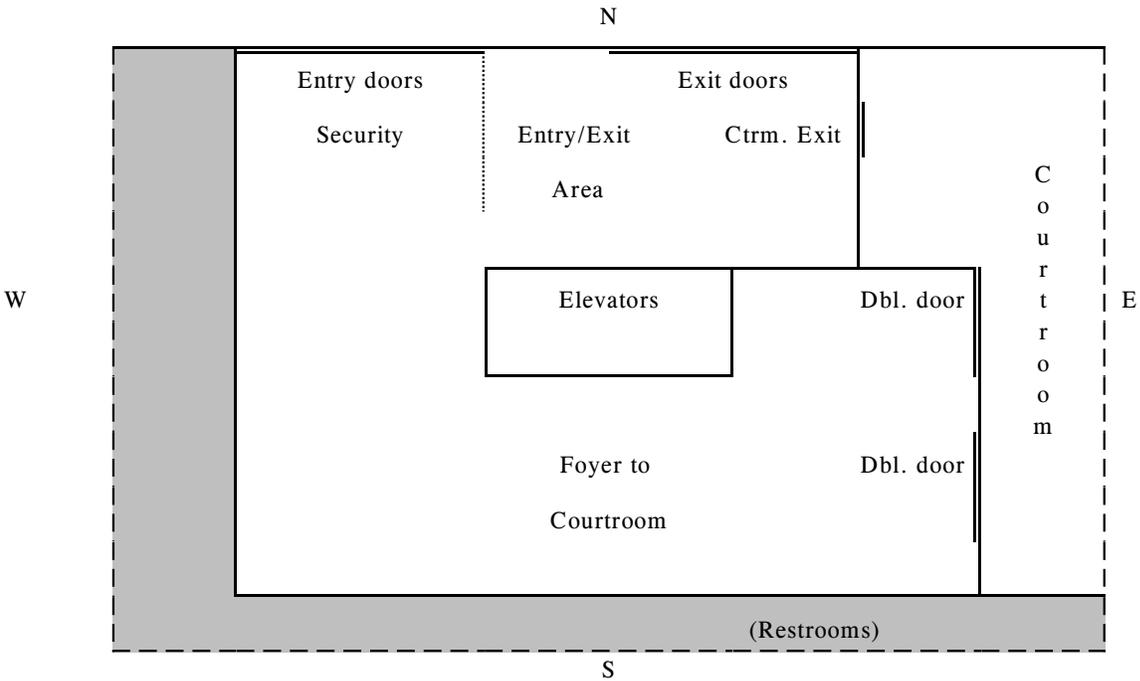
Many of the findings below will make better sense if I first lay out the configuration of the entry/exit area to the courthouse and the courtroom in which the trial in this case occurred. This is true, in part, because the courtroom is rather strangely configured, recognizing that the space was not originally designed as a courtroom, just as the courthouse was not originally designed as a courthouse.

The main entrance to United States Courthouse for the District of the Northern Mariana Islands faces north, with a public parking lot across the street to the north. The area immediately outside the public entry is covered by an overhang of the floors above. People enter the courthouse through one set of exterior double doors, the west set, and exit through another set of exterior double doors, the east set. The entry/exit area (sometimes referred to by witnesses as the lobby) just inside these two sets of double doors is set off from more interior sections of the first floor by a pair of elevators and a wall continuing to the left (east) of the elevators. Although one can pass to the right (west) of the elevators, and around behind (to the south of) them, into a foyer area to the first floor courtroom, there is a partition wall to the east of the elevators that closes off the courtroom

foyer area from the entry/exit area. To the south of the partition wall, in a wall running north and south, and thus forming part of the western wall of the first floor courtroom, are two sets of double doors providing entry into the first floor courtroom. To the north of the partition wall, in a continuation of the courtroom's western wall, is a single door from the courtroom back into the entry/exit area for the building. This door has a handle only on the courtroom side, has no window, and is intended primarily as an emergency exit from the courtroom.

Thus, when one enters the courthouse through the west set of exterior double doors, one passes through the security screening post, then either into one of the central elevators, or around the west end of the elevators to the courtroom foyer area behind (to the south of) the elevators. When one leaves the courtroom by one of the two sets of double doors, one must reverse course back around the elevators, into the entry/exit area, and out the east set of exterior double doors to the street. If one exits the courtroom by the single door ordinarily used only as an emergency exit, one passes into the eastern part of the entry/exit area, north of the partition wall, and out the same eastern set of exterior double exit doors to the street.

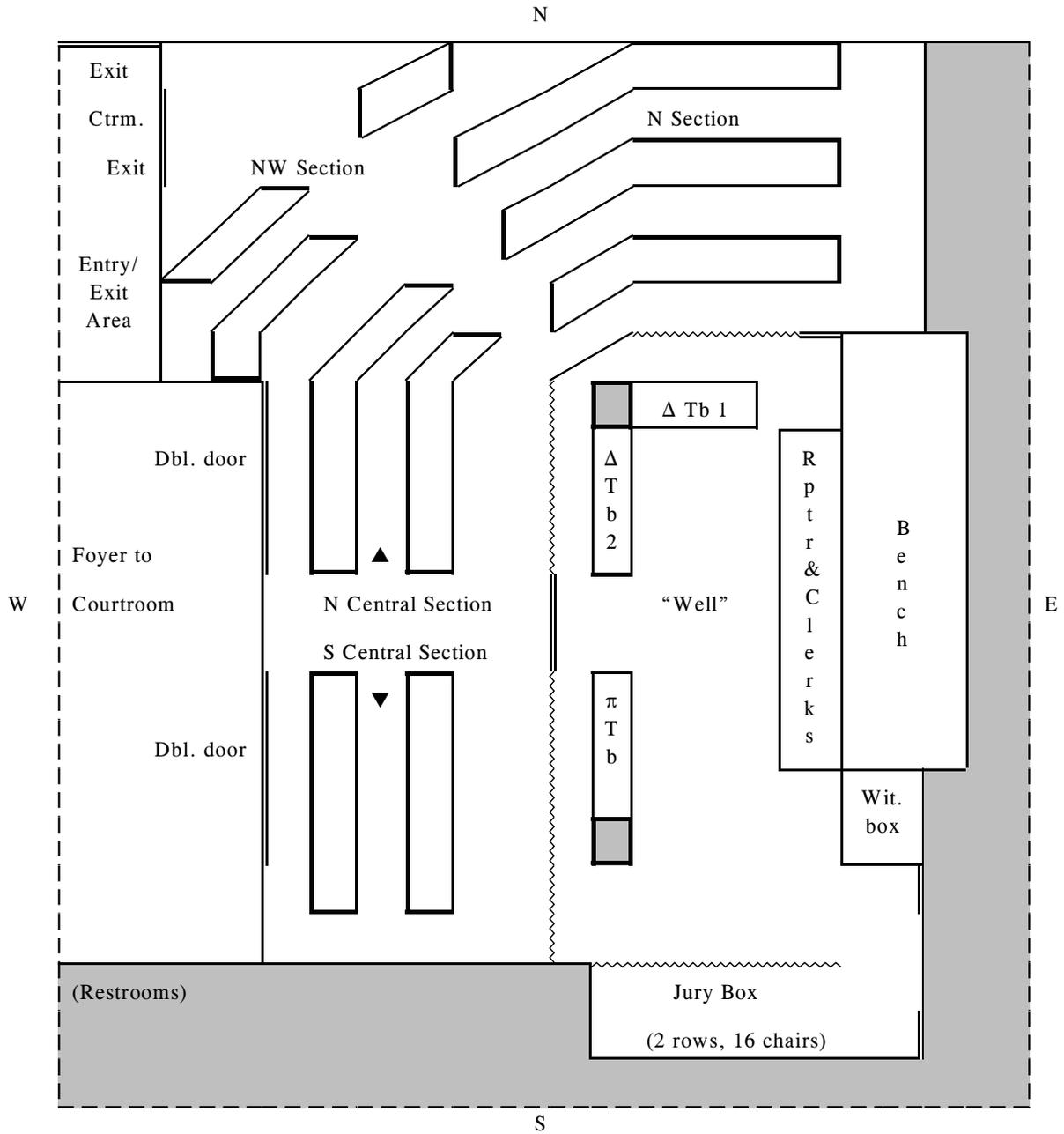
A rough floor plan, drawn from personal observation, albeit not to scale, of the parts of the first floor of the courthouse described so far appears below. Solid walls are indicated with single lines, doors are indicated with double lines, and spaces that continue beyond the areas shown are indicated with segmented lines. The dotted line to the east of the "security" area indicates a dividing "rope" or other movable barrier.



As noted above, there are two double doors and a single door (with a handle only on the courtroom side, no window, and intended only as an emergency exit) in the western wall of the courtroom. Seating in the courtroom is in four sections to the north and west of the “well” of the court. I will call these four sections, respectively, moving counterclockwise from the northeast corner, the North Section (three rows), the Northwest Section (three rows, one northeast of the aisle, and two southwest of the aisle), the North Central Section (two rows), and the South Central Section (two rows). The “well” is defined by a divider. Just inside that divider are two columns, which partially or completely obstruct views to and from various parts of the courtroom. One defense table extends to the east from the northernmost column, and a second defense table and the prosecution table sit between the columns. The bench occupies the eastern side of the “well,” against the central section of the eastern wall of the courtroom. The witness box is at the south end of the bench. The jury box is also to the south of the bench, in a recess

or alcove on the south wall of the courtroom. Two doors to the east of the jury box are, respectively, to a holding cell (the door nearest the witness box) and to a jury deliberation room (the door nearest the jury box).

A rough floor plan of the courtroom, also from personal observation, albeit also not to scale, appears below. Solid walls are again indicated with single lines, doors (and gates in permanent dividers) are indicated with double lines, and spaces that continue beyond the areas shown are indicated with segmented lines. In addition, permanent dividers are indicated with wavy lines, columns are indicated by shaded spaces with heavy borders, rows or pews are indicated by heavy lines for backs and ends (except for diagonal lines) and fine lines for fronts.



In the course of earlier proceedings in this case, I discovered that the clerk’s office had photographs of the interior of the first floor courtroom, taken by a member of the clerk’s office staff, a neutral party, for other purposes, during the course of the trial of these defendants. I included these photographs in a prior ruling denying bail on appeal,

see *United States v. Villagomez*, 708 F. Supp. 2d 1105, 1109-10 (D. N. Mar. I. 2010), and I believe that including them here is also appropriate, for the purpose of showing the configuration of the courtroom.

The first photograph shows a spectator's view from the eastern wall of the courtroom, to the right (north) of the bench, showing the North Section of three rows or pews of seating. The North Section is behind one table for defense counsel, and the eastern portion of the three rows in that section (east of the angled portion, nearest the viewer) sit directly opposite the jury box, which is out of view to the left (south).



The second photograph shows a view from the southwest corner of the gallery, looking left (north), with the North Section from the first photograph beyond the left (far) column, and the bench showing between the columns. The two nearest rows or pews in this photograph, that is, those south of the central aisle, are the South Central Section, and the two rows or pews just north of the central aisle are the North Central Section. The North Central Section is behind a second defense table, which is perpendicular to the first defense table, and the South Central Section is behind the prosecution table.



The third photograph shows a view from the back of the gallery, that is, at the courtroom's western (entry) wall, behind the South Central Section, looking right

(southeast), with the bench to the left (north) of the column and the jury box to the far right (south) of the column.



B. Specific Findings

I now turn to specific findings of fact about jury selection in this case. I begin with the courtroom management policies and practices generally used during jury selection for trials in this courtroom, then turn to the way in which the courtroom was actually managed during jury selection in this case. I next turn to the treatment of waiting spectators, including members of the general public and defendants' family members. Finally, I will

examine what, if anything, defendants and their counsel knew or should have known about public access and access of family members to the courtroom during jury selection.

1. Courtroom management policies and practices

The trial judge in this case, Hon. Alex R. Munson, who has since taken senior status, was a judge in the Northern Mariana Islands for twenty-eight years, and was nominated for the first of his two ten-year terms as a United States District Judge for the District of the Northern Mariana Islands in 1988. He presided over “hundreds” of jury trials during his judicial career. He had no policy regarding allowing members of the public access to the courtroom during jury selection, because, in his view, the public was “always” allowed access to the courtroom during jury selection. Real Time Transcript, Hearing Day 1 (November 9, 2010) (RTTD1), 9-10.² He did not have any different policy for the trial in this case, because “trials are public, and the public is free to come.” RTTD1 at 10. Thus, I find that Chief Judge Munson had no policy to exclude the public from jury selection during this or any other trial.

Chief Judge Munson acknowledged, however, that this was his courtroom and that he was responsible for and controlled it during the trial in this case, and more specifically still, that he was responsible for implementing any policies regarding how the public and jury selection were handled. RTTD1 at 11-12. He communicated only with the Marshal’s Office about courtroom security or courtroom management matters and did not delegate communications with the Marshal’s Office about those matters to other members of his

²I recognize that the real time transcript is not official, that the pagination of the final, official transcript may differ, and that the official transcript may be available by the time these findings are considered by the Ninth Circuit Court of Appeals. Nevertheless, I believe that citations to the real time transcript will be helpful to locate the testimony on which I have relied in making specific findings of fact. Just as I have cited the real time transcript for day one of the Rule 10(e) hearing, November 9, 2010, as RTTD1, I will cite the real time transcript for day two of the hearing, November 10, 2010, as RTTD2.

staff. RTTD1 at 38-39. Chief Judge Munson dealt directly with the Deputy Marshal in charge on matters of courtroom security, and the Marshal's Office was not allowed to implement a policy on its own without first having that policy authorized by Chief Judge Munson. RTTD1 at 12. Chief Judge Munson testified that, if he had been advised of any order or policy to close the courtroom during jury selection, he would have said "that it's a public trial, and that the public could not be excluded. You have to let them in. If—for as much room as is available to them." RTTD1 at 13.

Even though Chief Judge Munson recognized that jury selection is to be open to the public, he also recognized that there could be problems with members of the public having contact with prospective jurors:

We've had a lot of problems in the past with the public approaching the prospective jurors and telling them that their families or their jobs wouldn't be safe unless they voted a certain way. We even had a conviction or maybe even two. So yes, it is my policy to segregate the prospective jurors from the public during voir dire and during the trial.

RTTD1 at 30-31. Chief Judge Munson denied that his policy is that members of the public and prospective jurors cannot sit next to each other and, indeed, stated that his policy would have allowed members of the public to sit alongside of prospective jurors in the courtroom. RTTD1 at 31. His concern was "when the jury is leaving the courtroom and when they are out in the lobby, that they not be approached by the public and harassed or threatened or stared down." RTTD1 at 31. However, he did not have any discussions with the Marshal's Office or anyone else regarding the procedures for bringing in prospective jurors the first day of trial in this case. RTTD1 at 40-41.

While Chief Judge Munson testified that he was "responsible" for the courtroom and controlled it during the trial, I find that the policies adopted or implemented concerning courtroom management were not necessarily attributable or even known to

Chief Judge Munson. Chief Judge Munson testified that his policy would have allowed members of the public to sit next to prospective jurors in the courtroom, but the record now makes abundantly clear that the Marshals and CSOs operated under a different policy, or rather, a different customary practice, that Chief Judge Munson did not know about, approve, or authorize.

Specifically, Deputy Marshal Calvert and Deputy Marshal Hall both testified that they operated under a “policy” not to allow a member of the public to sit in any row occupied by a prospective juror during jury selection. Deputy Calvert, in fact, attributed this “policy” to “the Court.” RTTD1 at 47. Chief Judge Munson, however, had no such “policy,” and I find that the “policy” in question was not attributable to him or even known to him. Deputy Calvert also described this “policy” as one that applied to all trials in Saipan. RTTD1 at 47. He also asserted that the second part of this “policy” was that “once the left wing [described herein as the North Section] was clear, that was secured off except for reporters, defense staff, members of the court, and the school[s],” and that this was done “for security purposes.” RTTD1 at 47. On the other hand, if there was seating available, the public would be allowed to come into the courtroom during jury selection. RTTD1 at 49. Deputy Hall testified that the rule that members of the public could not sit in the same row as prospective jurors was a “standard operating procedure” of the United States Marshals Service, not only in Saipan, but in other jurisdictions where he had worked, although he was later forced to concede that it was not a written policy of the United States Marshals Service, but something that he had been trained to do elsewhere and had also been told was done in Saipan. RTTD2 at 46-53. Almost all of the Deputy Marshals and all of the CSOs testified that they also operated under such a “policy” of barring members of the public from any row in which a prospective juror was seated, but occasionally consolidating remaining prospective jurors and allowing members of the

public to be seated in available rows. *But see* RTTD1 at 114 (Deputy Punzalan testified, “No policy was mentioned to that effect, at least to me.”). Finally, court security staff, including Deputy Punzalan, testified, without contradiction, that no standing was allowed in the courtroom, so that any member of the public or prospective juror in the courtroom had to have a seat. *See* RTTD1 at 107 (testimony of Deputy Punzalan concerning a “no standing” policy); RTTD1 at 151 (similar testimony from CSO Atalig).

Consequently, I find, by any applicable standard of proof, that the *customary practice* employed by security staff, but not known to or approved by Chief Judge Munson, during this and other trials in this courthouse was that members of the public could not be seated in the same row with a prospective juror during jury selection; that no standing was allowed in the courtroom, so that everyone in the courtroom had to be seated, either in a pew or in an extra chair; and that, as prospective jurors were excused, the court security staff would attempt to consolidate prospective jurors, so that rows would be made available for members of the public. However, there was no standing order, policy, or practice of the court, the Marshals, or the CSOs to exclude members of the public from jury selection.

2. Courtroom management in this case

Turning from courtroom management policy and practice, in general, to courtroom management during jury selection in this case, in particular, I note that Chief Judge Munson testified, in part, as follows:

Well, I recall that the panel was probably the biggest one we ever had. I think it was 90 to a hundred people, and that pretty well filled the courtroom. . . .

RTTD1 at 11. More specifically, two panels of prospective jurors were called for jury selection, one of ninety to a hundred people, to report the first day, and a second panel to report the second day. However, the first panel was not exhausted before the jury was

selected, so the second panel did not, in fact, have to report. The trial minutes show that 96 prospective jurors were checked in for orientation at 8:00 a.m. on March 30, 2009, the first morning of jury selection. Trial Minutes, docket no. 164.³ Jury orientation was completed at 11:30 a.m. *Id.* After a lunch recess, 91 prospective jurors were present at 1:00 p.m. for the start of jury selection. *Id.*

I find, from overwhelming evidence, that as the prospective jurors arrived, they were screened through security first, before members of the public were screened. Indeed, only prospective jurors were allowed to enter the courthouse during jury selection; members of the public and family members who were not prospective jurors were asked to move aside to let prospective jurors pass through security. For the remainder of jury selection, members of the public were required to wait outside the courthouse, either under the overhang near a soda machine to the east of the entrance, or across the street to the north in the parking lot. While it might have been possible to allow some pre-screened members of the public or family members interested in attending jury selection to wait inside the entry/exit area outside the single door into the courtroom on the east side of the entry/exit area, so that they could be let in promptly if spaces in the courtroom became available for them, there was no evidence presented at the Rule 10(e) hearing that such a procedure was followed in this case.

There were so many prospective jurors that what I have identified as the courtroom foyer was used as a secure jury assembly area from which the public was excluded. Although Chief Judge Munson did not recall whether extra chairs had to be brought into the courtroom to accommodate all of the prospective jurors, *see* RTTD1 at 41, I can

³There is no dispute that only prospective jurors were admitted to the courtroom during orientation, but neither is there any argument or claim that juror orientation should have been open to the public.

readily find, by overwhelming evidence, that numerous additional chairs had to be brought into the courtroom to accommodate all of the prospective jurors. *See, e.g.*, RTTD1 at 53 (testimony of Deputy Calvert). I also find, by overwhelming evidence, that the prospective jurors at least initially filled the courtroom to capacity, leaving no seats for members of the public. Indeed, there is no possible way that this courtroom would have had room for any members of the public in addition to 91 prospective jurors, with court personnel and defense and prosecution staff, even with extra chairs in all reasonably available spaces.

At the conclusion of the first day of jury selection, all remaining jurors were released for the evening and told to return at 9:00 a.m. the following morning to continue the jury selection process. Trial Minutes, docket no. 164. At 9:00 a.m. on March 31, 2009, at the beginning of the second day of jury selection, 55 prospective jurors reported. Trial Minutes, docket no. 167. Twelve regular jurors and six alternates were ultimately seated at 11:40 a.m. that day. *Id.* While the courtroom was certainly full of prospective jurors, at least at the beginning of the first day of jury selection, and additional chairs were required to accommodate them all, even at the beginning of the second day of jury selection, with 55 prospective jurors present, and rows in the gallery devoted to prosecution and defense staff, there likely was little, if any, room for members of the public in the courtroom. This is particularly true, because by that time, two of the pews in the North Section, which are the longest pews in the courtroom, were cordoned off and not being used. RTTD1 at 258 (testimony of prospective juror Juan Tenorio).

As to the key question of whether members of the public were admitted to the courtroom during jury selection in this case, Chief Judge Munson testified, in part, as follows:

I assumed the public was also in the courtroom at all stages. Maybe everybody that wanted to come in, there wasn't

room for, but there was no exclusion of the public [from] the courtroom.

Real Time Transcript, Day 1, at 11. Chief Judge Munson explicitly testified, and I specifically find, that he never issued a written or oral order that jury selection would be closed to the public in this case, nor did he authorize any of the Marshals or the other subordinates to impose such an order. RTTD1 at 12-13; *see also* RTTD1 at 49 (testimony of Deputy Calvert confirming that there had been no such order from Chief Judge Munson). Chief Judge Munson also was not aware that anyone had adopted such an order, and no one ever brought to his attention that such an order had been imposed. RTTD1 at 13.

Although Chief Judge Munson was aware that the panel of prospective jurors in this case was very large, and that the majority of the seating was taken by the prospective jurors, at least the first day, he did not know if the prospective jurors occupied all of the seats in the courtroom, and he “assume[d] that there were other people, the public, in the courtroom.” RTTD1 at 14. He also admitted that he did not know from personal recollection whether any members of the public were actually in the courtroom at any time during jury selection, RTTD1 at 19, and that he did not know the maximum capacity of the courtroom. RTTD1 at 17.⁴ He also acknowledged that the prospective jurors were seated before he entered the courtroom, and that he had never had any conversation with any Marshal about escorting people to a particular place in the courtroom. RTTD1 at 21. I find that there was no way for Chief Judge Munson, the Deputy Marshals, or the CSOs

⁴ I do not find it surprising that Chief Judge Munson did not know the seating capacity of the courtroom over which he had presided. I do not know the capacity of the courtroom over which I have presided for more than sixteen years, even though I was involved in extensive renovations of that courtroom that included expanding the well and reducing the available public seating.

to distinguish prospective jurors from members of the public in the courtroom, unless one asked them. RTTD1 at 22-23. Indeed, nothing about dress or appearance would have distinguished members of the public from prospective jurors. RTTD2 at 34-35 (Deputy Hall testified that there was no visual way to distinguish a member of the public from a prospective juror).⁵ Thus, I find that Chief Judge Munson did not know at the beginning of jury selection, and did not know at any other time during jury selection, whether or not any members of the public were present.

I find, further, that at no time during jury selection did the United States Marshal's Office or the CSOs ever advise Chief Judge Munson that there was no room for members of the public in the courtroom. Ideally, the U.S. Marshal's Office or CSOs would have advised Chief Judge Munson prior to jury selection that, with almost one hundred prospective jurors scheduled to attend orientation and selection on the first day, it would not be possible to accommodate members of the public in the courtroom as well. This problem would have existed, even in the absence of the Marshal's policy or practice of not seating members of the public in the same row as a prospective juror. Moreover, the U.S. Marshal's Office or CSOs could reasonably have been expected to inform Chief Judge Munson just before jury selection began at 1:00 p.m. on March 30, 2009, that, with 91 prospective jurors present, no members of the public had been allowed to come into the courtroom. However, the record shows that neither the Marshal's Office nor the CSOs informed Chief Judge Munson of that fact before he took the bench for jury selection. Finally, the U.S. Marshal's Office and the CSOs were in the best position to know that no members of the public were being seated during the course of the first day of jury

⁵ I find it rather odd that the simple expedient of giving prospective jurors lapel tags labeled "Juror" was not used to allow court security staff to distinguish quickly between prospective jurors and members of the public or other people in the courtroom.

selection, because their personnel were controlling entry to the courtroom, but no one from those offices ever informed Chief Judge Munson that members of the public were not getting into the courtroom during the first day of jury selection or, for that matter, at any other time during jury selection.

Chief Judge Munson twice described the courtroom as “small,” RTTD1 at 11 & 32, and I find that it is, perhaps, smaller than the photographs above may suggest, because of the somewhat elongated perspective in some of those photographs. Moreover, the panel of prospective jurors was, perhaps, the largest ever called for a case tried in that courtroom. Thus, it should have been apparent to Chief Judge Munson, even if he did not know the precise seating capacity of the courtroom and did not recall at the time of the Rule 10(e) hearing that extra chairs had been brought in to seat prospective jurors, *see* RTTD1 at 41, that the courtroom would be full of prospective jurors, leaving no room for members of the public without some accommodation for their presence. Indeed, it should have been apparent when Chief Judge Munson took the bench for jury selection in this case that extra chairs were in use to seat all of the prospective jurors, because one could not help but have noticed the addition of chairs to that courtroom. Although Chief Judge Munson assumed that members of the public were in the courtroom for the first day of jury selection, the record shows that assumption was mistaken. However, in fairness to Chief Judge Munson, he was about to pick a jury in a very complicated, lengthy, and high profile case, and his attention was quite reasonably focused on other matters. Moreover, he received no assistance from the Marshal’s Office, the CSOs, the United States Attorney’s Office, the particular prosecutors involved, or defense counsel in recognizing that there was, at the very least, a potential problem with public access to the courtroom during jury selection.

I also find that Chief Judge Munson did not instruct anyone that prospective jurors were to be seated first during jury selection, before any members of the public could be seated, RTTD1 at 24, although I find, by overwhelming evidence, that is what, in fact, occurred. *See, e.g.*, RTTD1 at 53 (testimony of Deputy Calvert agreeing with counsel's statement that "because of the large number [of prospective jurors], they were first ushered in, and they get first priority in the seating arrangements"); RTTD1 at 55 (same, testifying that "Jury comes in first and exits first"); RTTD1 at 108 (testimony of Deputy Punzalan that prospective jurors were given priority in seating in the courtroom).

Almost every deputy Marshal and every CSO testified that he or she had not allowed members of the public to sit in the same row with a prospective juror during this trial. *But see* RTTD1 at 114 (Deputy Punzalan testified, "No policy was mentioned to that effect, at least to me."). Every one of them also testified that they followed a procedure of consolidating remaining prospective jurors into the same rows, as other prospective jurors were excused, to make empty rows for members of the public to use. *See* RTTD1 at 61 (Deputy Calvert testified, "Yes as we eliminated the jury panel and created open areas, then at that time when an area became open did we allow extra public to come in [and] as I recall, what we did was rotated the jury pool to consolidate space as they were getting eliminated."). However, not one of them could specifically recall admitting a member of the public into the courtroom during jury selection in this case.

Moreover, because the courtroom foyer was used as a secure area for prospective jurors, the only entrance that members of the public could use was the single door at the northwest corner of the courtroom, which was ordinarily only used as an emergency exit from the courtroom, because it had no handle on the outside. That door also had no window. Thus, any access to the courtroom by members of the public required a court security staff member on the inside of the courtroom to radio to security staff on the

outside that spaces for the public were available; the appropriate number of members of the public had to be screened and escorted to the single door to the courtroom in the exit/entry area; a security person on the inside of the courtroom had to be notified that members of the public were ready to enter; the single door had to be opened by a security person on the inside of the courtroom; and the members of the public who were allowed to enter had to be directed to the seats available to the public. There is no evidence in the Rule 10(e) record that this procedure had ever been used before or since the trial in this case for admitting members of the public to the courtroom during jury selection.

Despite this complicated procedure, not one deputy Marshal or other court security person recalled having actually seated a member of the public during jury selection. *See* RTTD2 at 5 (Deputy Rippey did not specifically recall that any members of the public were admitted during the two days of jury selection); RTTD2 at 16 (CSO Agulto did not recall letting any member of the public in during jury selection); RTTD2 at 24 (CSO Fejeran did not recall ever seeing a member of the public seated during jury selection); RTTD2 at 66 (Deputy Veasey did not know if any members of the public were admitted during jury selection, because he “was not working the door”); RTTD2 at 70 (contract guard Renguul did not recall any member of the public being allowed in during jury selection); *and compare* RTTD1 at 197 (former lead CSO Dela Cruz testified that members of the public were not able to enter the courtroom until jury selection was done).⁶

⁶The lack of evidence that any court security personnel actually recall admitting any member of the public during jury selection is consistent with the testimony of excused prospective jurors that they did not see any members of the public in the courtroom during the portions of jury selection during which they were in the courtroom. *See* RTTD1 at 124 (prospective juror Mateo Santos testified that he did not see any members of the public who were not prospective jurors in the courtroom while he was there for jury selection); (continued...)

This is so, notwithstanding, for example, Deputy Calvert’s answer to the question, “Do you have any specific recollection of the public coming in and taking seats during jury selection?,” which was, “Yes. . . . [W]e had to rotate the public there was so many public that wished to come in.” RTTD1 at 49-50. Deputy Calvert provided no testimony at all that he actually seated any member of the public or actually saw any member of the public being seated in the courtroom during jury selection. Deputy Calvert also admitted that he was not absolutely sure of the day or days of his purported encounters with the public going in and out of the courtroom, because “[t]hey [the days] pretty much blended together.” RTTD1 at 76. Moreover, Deputy Calvert’s testimony, in general, lacks substantial credibility. He admitted that his memory of events during this trial was “hazy,” RTTD1 at 67, and that he was “getting pretty confused.” RTTD1 at 76. He was also mistaken about various events. For example, he testified that he had been in and out of the courtroom several times during jury selection, but he believed that he had done so on the morning of the first day, when the record shows that the morning of the first day had been devoted to jury orientation, not to jury selection. He also testified that two pews in the Northwest Section had been reserved for the public on the morning of the first day, but again, the morning of the first day had been devoted to jury orientation, and no members of the public were admitted at that time. *See* RTTD1 at 66-67. Also, when

⁶(...continued)

RTTD1 at 245-46 (prospective juror Juan Tenorio did not recognize any members of the public, other than fellow prospective jurors, in the courtroom during the time he was present for jury selection into the second day, even after the courtroom was “quite empty”); RTTD1 at 230 (prospective juror Amelia Camacho did not see any members of the public allowed to enter the courtroom during the first day of jury selection). This consistency exists notwithstanding my skepticism that any prospective juror (or, for that matter, any court security personnel) could have recognized and distinguished all of the prospective jurors from any members of the public.

asked whether he recalled consolidating prospective jurors on the first, second, or third day of jury selection, he testified that he did not know, without recalling that jury selection had been completed before noon on the second day. RTTD1 at 75-76. Finally, Deputy Calvert admitted that he had refreshed his memory. He testified, “I talked with the U.S. Attorney’s Office and tried to talk with different team members. We just tried to piece our memories together.” RTTD1 at 66. Thus, there is no way to be certain that Deputy Calvert was testifying from his own memory of events, rather than from a sort of “composite” memory “pieced together” with input from others.

Deputy Punzalan also testified that he saw members of the public take available seats during jury selection, but he also could not recall which day, and testified only to what “we” did, not to what he specifically recalled doing. *See* RTTD1 at 109 & 111-12. Deputy Punzalan also testified that he “d[id]n’t recall” whether he personally seated any member of the public in a vacant seat, and only that he “may have during the trial.” RTTD1 at 114. CSO Atalig testified that he could not recall whether any members of the public were seated on the first day, and that seats became available for members of the public on the second day. RTTD1 at 143. However, he later testified that he could not recall one way or the other whether any members of the public were ever allowed to come in and watch during any part of jury selection. RTTD1 at 145 & 148. CSO Atalig also testified that he could not recall whether remaining prospective jurors were ever consolidated to make rows available for the public during jury selection in this case. RTTD1 at 153. CSO Babauto also testified, initially, that he saw members of the public admitted to the courtroom during the first and second days of jury selection, RTTD1 at 167, but then testified, “If I may recall, [it] could have happened, but it’s just that I cannot recollect all the time, because we were busy,” that he could not recall any specific person he let in, and that he “believed” that he let people into the courtroom, but that he was “not

100 percent certain.” RTTD1 at 168-69, 183. These vague and inconsistent recollections do not amount to sufficient evidence, by any applicable standard of proof, from which I could find that any court security personnel seated any member of the public during jury selection.

Chief Judge Munson had reserved part of the North Section for visiting college students during the trial in this case. RTTD1 at 28. His recollection is that the entire section was not reserved; rather, two pews, and not necessarily all of those two pews, were reserved for the visiting students. RTTD1 at 28. Chief Judge Munson declined to allow any other members of the public to sit in the seats reserved for students during the trial. RTTD1 at 28-29. On the other hand, Chief Judge Munson now has “no idea” whether the seats reserved for visiting students were open to the general public during jury selection, but he testified that the section was occupied during jury selection, he just does not know by whom. RTTD1 at 29-30. When asked, “So are you saying that the reservation—there was no reservation for the students during voir dire?,” Chief Judge Munson answered, “That’s correct.” RTTD1 at 30. Moreover, at least one prospective juror testified that he sat in the third row of the North Section during jury selection. *See* RTTD1 at 123-24 (prospective juror Mateo Santos). Thus, I find that the portion of the North Section reserved for students during trial was *not* reserved during jury selection on Chief Judge Munson’s orders.

On the other hand, security personnel testified that no members of the public were allowed to sit in the North Section during jury selection or at any other time during this trial. *See* RTTD1 at 58-59 (Deputy Calvert testified that, as a result of a decision of the United States Marshals Service, “[t]he standard practice of all trials [is] there is no member of the public that sits on those pews on the north face, because those are nontraditional design,” although Chief Judge Munson could and did authorize exceptions,

such as reserving that section for visiting students). A prospective juror also testified that, before he was excused on the second day of jury selection, the North Section was roped off and no members of the public were sitting there. RTTD1 at 258 (testimony of prospective juror Juan Tenorio). There is simply not a sufficient basis for me to find, by any standard of proof, that any portion of the North Section was ever opened to members of the public during jury selection.

Indeed, during the four weeks that I have used the courtroom as a visiting judge (two weeks in April 2010 and two weeks in November 2010), the entire North Section has been cordoned off and not used. That was the situation during the Rule 10(e) hearing, as well. The additional photographs shown below, taken at my request by a member of the clerk's office staff, show the red rope cordoning off this section. The first, taken from just inside the northern double door to the courtroom, shows the three rows of the North Section roped off, with the two rows of the North Central Section in the foreground on the right, and two of the three short rows of the Northwest Section (one northeast of the aisle, behind the North Section, and one southwest of the aisle) on the left:



The second photograph, taken from just inside the single door in the northwest corner of the courtroom, shows the three rows of the North Section roped off, with a single short row of the Northwest Section (the one northeast of the aisle), not roped off, in the foreground:



These photographs represents my experience with the cordoned off rows during my observations of the courtroom. There is no evidence in the Rule 10(e) record, so I express no opinion, as to whether these particular ropes and stanchions were in place during the trial in this case.

I find that, for some time from before the trial in this case to the present, the North Section has been routinely or habitually cordoned off and not used during proceedings in this courtroom. I also find that, from the beginning of the second day of jury selection in this case, this section was also cordoned off and not used, except for defense staff, and during trial in this matter, this section was either cordoned off, or used only for defense staff, press, and visiting students.

There was some testimony, for example, from Deputy Calvert, suggesting that two rows in what I have called the Northwest Section were reserved for members of the public, even during jury selection in this case. *See* RTTD1 at 53. Deputy Calvert hedged his assertion on this point by stating, “if [he] recall[ed],” RTTD1 at 53; *see also* RTTD1 at 54 (stating that was his “recollection”); RTTD1 at 56 (he was “pretty certain of it”), and he stated under cross-examination, “I remember we had set some aside to try and make space for the public, but it’s possible that we needed extra space and they were temporarily used, but all pews were used throughout the duration.” RTTD1 at 75. Again, Deputy Calvert’s testimony, in general, lacks substantial credibility. He admitted that his memory of events during this trial was “hazy,” RTTD1 at 67; he admitted that he was “getting pretty confused,” RTTD1 at 76; he was mistaken about various events, such as when jury selection occurred and whether pews were reserved for the public, *see* RTTD1 at 66-67 & 75-76; and he admitted that he had refreshed his memory, *see* RTTD1 at 66. Moreover, Deputy Punzalan and Deputy Hall both contradicted Deputy Calvert’s assertion that some seats in the Northwest Section were reserved for the public, even during jury selection. Deputy Punzalan expressly testified that, not only did he have no recollection of “the back pews in the very back corner” being reserved for the public during jury selection, but that “[t]here was no reserved seating. It was—jurors were allowed to occupy the seats, and that was the priority of the day was [sic] to make sure that all the jurors had seating.” RTTD1 at 108. Deputy Hall also testified that he did not recall anything about a policy of reserving the last two benches in the Northwest Section for the public, *see* RTTD2 at 34, later adding that reserving some of the smaller rows in the back for members of the public would not have given security staff the seating capacity needed for all of the prospective jurors. RTTD2 at 58. Thus, I find that there is simply no reason to believe that Deputy Calvert was specifically recalling something that happened in the trial in this

case, rather than in some other case or cases, or that he specifically recalls that the pews purportedly reserved for the public were ever, in fact, reserved for the public during jury selection in this case. The overwhelming weight of the evidence is that no seats were reserved for the public during jury selection and that the entire courtroom was at least initially occupied by prospective jurors and court and legal staff.

Ultimately, I find that there is simply no credible evidence that any members of the public were allowed into the courtroom at any time during jury selection. I was the only person to ask any witness whether members of the press—who are necessarily also members of and proxies for the general public—were allowed in the courtroom during jury selection, but I received no definitive answer on that point.⁷ Therefore, I cannot find that members of the press, as members of and proxies for the general public, were allowed in the courtroom during jury selection.

However, I find that there was no order from either Chief Judge Munson or the Marshal's Office to exclude members of the public or family members from the courtroom during jury selection. Only former CSO Dela Cruz testified that he believed that there had been an order to exclude members of the public during jury selection—or at least an order that only attorneys, defendants and prospective jurors were allowed in the courtroom during jury selection—but that testimony was somewhat internally inconsistent, *see* RTTD1

⁷ I know that the press covered virtually every order I issued and every proceeding I heard during my two stints as a visiting judge to Saipan in 2010. Stories about orders that I had issued routinely appeared, for example, in the *Saipan Tribune*, even when there had been no court proceedings before such orders were issued. It would likely have been reasonably easy for the prosecution to produce either members of the press to testify about their presence in the courtroom during jury selection in this case or archives of news reports showing that reporters were present in the courtroom during jury selection in this case. One could conclude that the reason that no such evidence was produced was that there was none.

at 204-12, and was certainly inconsistent with the testimony of numerous other court security personnel that there was no such order. Thus, I find that the overwhelming, credible evidence shows that there was no order to exclude members of the public during jury selection. I find that the *effect* of the policy to seat all prospective jurors first and to seat members of the public only if space was available, coupled with the effect of the practice of prohibiting members of the public from sitting in rows occupied by prospective jurors, was to exclude members of the public or family members from the courtroom during jury selection, but there is no evidence that such was the *intent* of those policies and practices.

No alternatives to direct public access to the courtroom during jury selection were implemented in this case. Chief Judge Munson supposed that it would have been possible to transmit video of the proceedings in the courtroom to an “overflow room,” if the courtroom was so full that interested members of the public could not enter the courtroom, but he acknowledged that no such “overflow room” transmission had ever happened and that it did not happen in this case. RTTD1 at 34. Deputy Calvert testified that the configuration of the courthouse did not allow for an “overflow room” for members of the public to view courtroom proceedings remotely, although the Marshals did “think about it.” RTTD1 at 91 & 93. I find that there were other ways that the presence of the public in the courtroom during jury selection could have been reasonably accommodated, including calling a smaller panel of prospective jurors or calling the members of the panel into the courtroom for voir dire in smaller groups, even over several days, so that some seating in the courtroom would have been available to members of the public. There is no evidence, however, that these or any other reasonable accommodations were considered; certainly, none of them were implemented.

3. Treatment of waiting spectators

While there is no credible evidence that members of the public were admitted during jury selection, there is overwhelming evidence that members of the defendants' families and members of the public were not allowed to enter the courtroom when they attempted to do so during jury selection. Court security personnel testified consistently that they had to turn away members of the public, because prospective jurors had to be seated first, and the courtroom was full with just prospective jurors. Some court security personnel testified that, when such people first sought entry, they told them that no seats were available, but that they would be able to enter if seats became available. I cannot find, however, that these court security personnel always informed members of the public and members of the families that they could come into the courtroom during jury selection, if seats became available. There is also no evidence that members of the defendants' families or members of the public were expressly told by court security personnel when seats in the courtroom had become available and that some of the waiting spectators could then enter; indeed, not one deputy Marshal or court security officer testified that he or she notified members of the public or the defendants' families that seats had become available. Thus, I find that some members of the public and members of the defendants' families were told by court security personnel that they could not enter during jury selection; at least some of those family members were told by court security personnel that they would be allowed to enter later, if seats became available; but none of them were told by court security personnel when seats had become available if, indeed, any seats ever became available.

There appears to be no dispute that Rebecca Tenorio, a member of the defendants' family, was not allowed to enter the courtroom during jury selection, but she testified that she was told that she could not be allowed in, because no family members could enter

“yet.” RTTD2 at 79.⁸ There is also some dispute about whether Rowena Aldan, another family member, was told that she could not come in the courtroom during jury selection, because she was listed as a witness, *see* RTTD2 at 70-71 (testimony of contract guard Renguul), or because she was a family member or member of the public, and no seats were yet available for family members or members of the public, *see* RTTD2 at 85 & 87 (testimony of Rowena Aldan that “I think he [Rey Renguul] just said the public is not invited or family members can’t come in yet,” and admitting that he told her that she could “come back and try”). Thus, neither Rebecca Tenorio’s nor Rowena Aldan’s testimony will support a finding that she, or any other family member, was told by court security personnel that family members would not be allowed in the courtroom *at all* during jury selection.

There is no basis on which I could find that any members of the defendants’ families were prevented from entering the courtroom at all during jury selection *because* they were family members, as a prohibited group, or that any members of the public or members of the families were prevented from entering the courtroom pursuant to an order or policy of the court or the Marshal’s Office to exclude members of the families or members of the public from the courtroom during the entirety of jury selection. The only order or policy preventing their entry was the order, policy, or practice of the Marshal’s Office to seat all prospective jurors before allowing any members of the public to be seated in any remaining available seats, and defining available seats as only those in a row not occupied by a prospective juror. On the other hand, there is no evidence that any family member

⁸Rebecca Tenorio testified that she was told this by contract guard Renguul, *see* RTTD2 at 79, but he denies speaking to her, although he knew who she was, and did recall speaking to other family members. *See* RTTD2 at 75.

or member of the public was ever allowed to enter the courtroom during jury selection or told when seats had become available for members of the public or family members.

4. *What defendants and their counsel knew or should have known*

Finally, I turn to the questions of whether and why no objection was made *at the time* to the purported closure of the courtroom to members of the public and family members during jury selection in this case. To be clear, I now believe that it is for the Ninth Circuit Court of Appeals to determine whether or not the out-of-circuit decisions in *United States v. Hillsberg*, 812 F.2d 328 (7th Cir.), *cert. denied*, 481 U.S. 1041 (1987), and *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), upon which I had originally relied, stand for the proposition that belated assertion of a claim of closure of the courtroom during jury selection, when the circumstances on which that claim was based were known or should have been known to the appellant at the time of trial, bar supplementation of the record concerning the claim pursuant to Rule 10(e). I also believe that it is for the Ninth Circuit Court of Appeals to decide whether or not to adopt such a rule. Thus, I again confine myself to the role of factfinder, attempting to settle the record as to whether and why no objection was made *at the time* to the purported closure of the courtroom to members of the public and family members during jury selection in this case.

I find by any applicable standard of proof that at least one defense attorney, Mr. Quichocho, knew on the evening following the first day of jury selection that members of the public had not been allowed in the courtroom the morning of the first day of jury selection. This is so, because there is no dispute that Mr. Quichocho's wife, who was supposed to assist him with jury selection, was not allowed into the courtroom at the start of the first day, because she was told (and told him) that only prospective jurors were being allowed in on the morning of the first day of jury selection. RTTD2 at 145-46 (Frances Quichocho testified, "I was lining up on the screening to get to the security, and

there was a whole bunch of people going in. I was, like, several people behind my husband lining up, and when I got to the door, one of the guard[s] asked me if I'm one of the prospective jurors, and I said no, but I'm helping my husband with the case. And I was told that if I'm not a prospective juror, then I'm not able to come in," and clarifying that this was "early in the morning [on the first day] when everybody started coming in."); RTTD2 at 146 (explaining that, that evening, "I'm not sure whether he asked me, but I mentioned that I was not able to get in because I was not a prospective juror, and that was it."). Frances Quichocho did not make any further attempt to enter the courtroom that day, and left after waiting about half an hour. RTTD2 at 146. She does not recall whether she attempted to enter the courtroom the second day of jury selection, but does recall that she did not get into the courtroom until opening statements. RTTD2 at 147. I find that the exclusion of Frances Quichocho on the first day occurred at the time of juror *orientation*, which was the morning of the first day. Although I find that she was not admitted to the courtroom until opening statements on the second day, I cannot find on the present record that she made any attempt to do so between the morning of the first day, at the time of juror orientation, and opening statements on the second day.

From this evidence, I find that the only information that Mr. Quichocho knew, from his wife's experience and comments, was that people other than prospective jurors were not allowed in the courtroom during juror *orientation*. There is no dispute, however, that only prospective jurors were admitted to the courtroom during juror orientation, and no argument or claim that juror orientation should have been open to the public. Because there is no evidence that Mr. Quichocho had any contact with his wife until the evening of the first day, and there are so many possible reasons for her failure to appear to assist him with jury selection, I cannot conclude from this record that Mr. Quichocho should have known that the reason—or even that a possible reason—for his wife's failure to

appear in the courtroom during jury selection the first day was that only prospective jurors were being allowed in the courtroom. Similarly, it might be possible for Mr. Quichocho to infer, from his wife's communication to him about her experience the first day, the lack of evidence that she tried to get into the courtroom the second day prior to opening arguments, and the lack of evidence that he tried to get her into the courtroom to assist him with jury selection the second day, that people other than prospective jurors were not being allowed into the courtroom during jury selection. However, that inference is too tenuous for me to find by the preponderance of the evidence (and certainly too tenuous for me to find by clear and convincing evidence) that Mr. Quichocho should have known that only prospective jurors were being allowed in the courtroom during jury selection.

Only Rowena Aldan provided any other evidence in the Rule 10(e) hearing from which one might be able to infer that family members or others could have communicated to defendants and their counsel that only prospective jurors were being admitted to the courtroom during jury selection. Unlike Mrs. Quichocho, Rowena Aldan attempted to enter the courthouse more than once on the first day of jury selection, and she also tried again on the morning of the second day, although, like Mrs. Quichocho, she also was not allowed to enter until opening statements. RTTD2 at 87-88. Rowena Aldan testified that, on the second day, she approached the courthouse *with her brother* (defendant Timothy Villagomez), *her brother-in-law* (defendant James Santos), *and their lawyers*, but she was told that "if [she] wasn't jury, [she] can't come in." RTTD2 at 99. It is possible that neither the defendants or their attorneys heard the reason that Rowena Aldan was not admitted to the courthouse, and it is possible that they did not even notice that she had not been admitted, because of the crowd waiting to enter the courthouse at that time and the likelihood that they had other things on their minds. I say that it is possible, but not very likely. Moreover, the record is clear that numerous family members were not allowed to

enter the courthouse, and I find that the absence of any family members (other than family members who had been called as prospective jurors) during the entirety of jury selection could not have gone unnoticed by the defendants, where they were not in custody, and they clearly knew from arriving with family members that members of the family were attempting to enter the courthouse during jury selection. Rowena Aldan also testified that the defendants themselves knew that family members, such as herself, were not being allowed into the courthouse during jury selection, because “[t]hey were right behind me when the marshals told me.” RTTD2 at 101 & 105 (Rowena Aldan testified that family members heard the reason she was told she could not come into the courthouse). Thus, I find that, at a minimum, the defendants themselves should have known at the time that members of their families who were not prospective jurors were not being allowed into the courtroom during jury selection.

Rowena Aldan also testified that the defendants and their attorneys mingled with family members in the parking lot across from the courthouse where family members were waiting during breaks in court proceedings on the first two days of jury selection. RTTD2 at 100. However, she testified that she never talked to the attorneys or told them that she or other family members were not being allowed into the courthouse, and she was “not sure if they knew that we were all walking in together.” RTTD2 at 101. Thus, while I find that the defendants themselves should have known that family members were not being allowed into the courthouse during jury selection, I cannot find that their attorneys also should have known that information.

Finally, there is no evidence, either in the contemporaneous record or the record from the Rule 10(e) proceedings, that any of the attorneys—for the defendants or the prosecution—ever noticed the absence of members of the public or family members from the courtroom during jury selection. There could be several reasons for what, in

hindsight, seems like glaring obliviousness: Just a few such possible reasons are that there was nothing in dress or appearance to distinguish prospective jurors from members of the public or members of the defendants' families and one can reasonably expect attorneys to have a sort of tunnel vision when focusing on a task as daunting and nuanced as jury selection. I do not (and cannot) make a finding as to what the reason might have been. I can only find that nothing in the record shows that the attorneys for the parties actually noticed, and I decline to find, on this record, that they should have noticed.

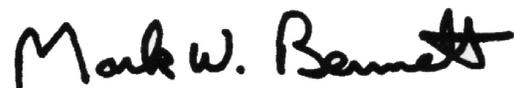
In short, I find that the defendants themselves should have known *at the time* about the exclusion of family members from the courtroom during jury selection, but I cannot find that the defense attorneys also should have known *at the time*. It certainly seems likely to me that the defendants complained to their attorneys that their family members were not being allowed to enter the courthouse or the courtroom during jury selection, but no evidence was produced in the Rule 10(e) proceedings that showed they communicated such concerns to their attorneys.

IV. CONCLUSION

I hereby settle and conform the record to the findings above pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

DATED this 24th day of November, 2010.



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