APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MANUEL YEPIZ, AKA Martin Sanchez, Seal G and Pony; *Defendant-Appellant.*	No. 07-50051 D.C. No. CR-05-00578-JFW-7

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSE LUIS MEJIA, AKA Jose Luiz Mejia, Jose Nernedes, Juan Martinez, Jose Mejia, Check Mejia, Jose Al Mejia, Joe Morin, Jose L. Mejia, "Checho", "Joe" and "Cheech", *Defendant-Appellant.*	No. 07-50062 D.C. No. CR-05-00578-JFW-37

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. FRANCISCO ZAMBRANO, AKA Franky Boy and "Franky", *Defendant-Appellant.*	No. 07-50063 D.C. No. CR-05-00578-JFW-35
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JESUS CONTRERAS, AKA Jessie Contreras, Yuck, *Defendant-Appellant.*	No. 07-50067 D.C. No. CR-05-00578-JFW-21
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MARIANO MEZA, *Defendant-Appellant.*	No. 07-50070 D.C. No. CR-05-00578-JFW-44

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SERGIO MEJIA, AKA Robert Mesa, Seal JJ, Jaws, *Defendant-Appellant.*	No. 07-50098 D.C. No. CR-05-00578-JFW-36

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GILBERTO CARRASCO, AKA Gilberto Carrasco, Jr., Gil Carrasco, Robert Carrasco, Gilberto Carrosco, Gilberto Corrosco, Julio Gonazalez, Vicente Hernandez, Vincente Hernandez, Vincente NMN Hernandez, Sergio Renteria, Juan Rosas, Beto, Betillo, Red and Cejas, *Defendant-Appellant.*	No. 07-50133 D.C. No. CR-05-00578-JFW-22

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ERNESTO OROZCO MENDEZ, AKA "Gordo", "El Gordo", Ernesto Mijares, Ernesto Mendoza Mijares, Ernesto Mendoza Orozco (Birth Name), *Defendant-Appellant.*	No. 07-50142 D.C. No. CR-05-00578-JFW-31
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. RAFAEL YEPIZ, *Defendant-Appellant.*	No. 07-50264 D.C. No. CR-05-00578-JFW-1 OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 7, 2015
Pasadena, California

Filed December 20, 2016

Before: Stephen Reinhardt, John T. Noonan, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Noonan;
Dissent by Judge Nguyen

SUMMARY*

Criminal Law

In appeals by nine defendants convicted of crimes arising out of their alleged membership or association with a Southern California gang, the panel remanded for fact-finding in connection with the defendants' joint *Brady* claims, vacated Manuel Yepiz's conviction due to defects in the district court's handling of his requests for substitution of counsel, and remanded for a new trial in Yepiz's case.

On the joint claim that the government violated *Brady v. Maryland* by failing to disclose the full extent of the benefits a cooperating witness received at trial, the panel rejected the government's arguments that the defendants waived this claim, that the allegedly withheld information would have been cumulative, and that the record conclusively shows that the benefits were all earned after the trial. In light of disputed facts surrounding the *Brady* claim, the panel remanded to the district court so that it may engage in the necessary fact-finding to ascertain whether the witness received benefits that were undisclosed to the defendants at

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the time at trial, and if so, whether *Brady* was violated as to each convicted count.

The panel held that the district court abused its discretion when it arbitrarily and without explanation rejected Manuel Yepiz's pro se April 9, 2006 letter seeking to replace his retained counsel with court-appointed counsel. The panel wrote that Yepiz's failure to submit his letter through the very counsel he was hoping to discharge does not negate the court's duty to inquire into the problems between Yepiz and counsel when they were first raised. The panel held that Yepiz did not waive his motion to substitute counsel by failing to reassert it at a May suppression hearing. The panel held that the record is sufficiently clear to determine, without remanding, that replacing counsel would not have caused significant delay or impeded the fair, efficient, and orderly administration of justice. The panel concluded that Yepiz was therefore entitled to discharge retained counsel "for any or no reason," and that if he still qualified as an indigent defendant at the time he sent his pro se letter requesting substitution, he was also statutorily entitled to appointed counsel under the Criminal Justice Act.

The panel addressed other issues in a concurrently filed memorandum disposition.

Judge Nguyen dissented in part. She wrote that the majority's holding that the district court's failure to consider Yepiz's letter is structural error requiring automatic reversal (1) invalidates well-established local rules prohibiting represented parties from communicating with the court pro se, and (2) by refusing to engage in harmless error analysis, brings this court seriously out of step with the Supreme Court's Sixth Amendment jurisprudence.

COUNSEL

Verna Wefald (argued), Pasadena, California, for Defendant-Appellant Manuel Yepiz.

Phillip A. Treviño, Los Angeles, California, for Defendant-Appellant Jose Luis Mejia.

Shawn Perez, Las Vegas, Nevada, for Defendant-Appellant Francisco Zambrano.

Phillip Deitch, Santa Monica, California, for Defendant-Appellant Jesus Contreras.

Donald C. Randolph (argued) and Ann-Marissa Cook, Randolph & Associates, Santa Monica, California, for Defendant-Appellant Mariano Meza.

Diane Berley, West Hills, California, for Defendant-Appellant Sergio Mejia.

Adam Axelrad, Los Angeles, California, for Defendant-Appellant Gilberto Carrasco.

Gary P. Burcham, Burcham & Zugman, San Diego, California, for Defendant-Appellant Ernesto Orozco Mendez.

Katherine Kimball Windsor (argued), Law Office of Katherine Kimball Windsor, Pasadena, California, for Defendant-Appellant Rafael Yepiz.

L. Ashley Aull (argued) and David Kowal, Assistant United States Attorneys; Robert E. Dugdale, Chief, Criminal

Division; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee United States.

OPINION

NOONAN, Circuit Judge:

Appellants are all alleged to be members or associates of the Vineland Boys ("VBS"), a gang located in Southern California. On November 30, 2005, a grand jury returned a 78-count first superseding indictment charging appellants and approximately forty other individuals with crimes arising out of their membership or association with VBS. Seven of the nine appellants were charged with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and with RICO conspiracy (Counts 1 and 2, respectively), and all appellants were charged with distribution of narcotics (Count 3). Other charged counts included violent crimes in aid of racketeering ("VICAR"), attempted murder, and possession with intent to distribute cocaine, methamphetamine, and marijuana.

Trial commenced on August 9, 2006. On October 26, 2008, the jury returned a verdict of not guilty as to five counts, a mistrial as to one count, and a verdict of guilty as to the remaining counts. Appellants' subsequent motions for judgments of acquittal and new trials were denied by the district court. Appellants—Manuel Yepiz, Jose Luis Mejia, Francisco Zambrano, Jesus Contreras, Mariano Meza, Sergio Mejia, Gilberto Carrasco, Rafael Yepiz, and Ernesto Mendez—timely appealed their convictions and sentences.

We note at the outset that this case was vigorously litigated over the course of two-and-a-half months. It

presented the district court with a gauntlet of complex legal questions, and required it to grapple with unique concerns to courtroom safety and logistics. We are now presented with nearly three dozen distinct legal questions on appeal. These questions have been met by the district court promptly and persuasively.

In this opinion we resolve (1) appellants' joint *Brady* claims, and (2) Manuel Yepiz's Sixth Amendment Right to Counsel claim. We address the remaining issues in a concurrently filed memorandum disposition.

I. DEFENDANTS' JOINT BRADY CLAIMS

BACKGROUND

At trial, one of the government's cooperating witnesses was Victor Bulgarian. In September of 2006, on direct examination, Bulgarian testified that he was previously arrested for possession and sale of methamphetamine in an unrelated case, and agreed to cooperate with law enforcement in exchange for a lesser sentence, and a grant of immunity for his testimony as a government witness. Bulgarian testified to having received no benefits from the government in exchange for his testimony. However, on cross-examination, Bulgarian testified to having received $5,000 in cash from the government after he testified to the grand jury in this case. Defendants noted that this testimony directly contravened a letter the government sent to them asserting that no witnesses received any benefits from the government in exchange for their testimony. The government acknowledged that it was "a glaring mistake," but argued that the error was cured because defendants had ample opportunity to cross examine Bulgarian on the subject of the $5,000 payment. Defendants did not raise the issue again either at trial or in a post-trial motion.

Approximately three years later, on August 20, 2009, Bulgarian testified in the trial of Horacio Yepiz.[1] On direct examination, Bulgarian once again testified to having received no benefit from the government in return for his testimony. On cross examination, Bulgarian testified that since his arrest for drug-related crimes in 2004, he had received roughly $100,000 to $200,000 in cash from five different law enforcement agencies, although he was unable to give an exact figure. He explained that he was able to solicit paid work from these agencies whenever he wanted ("I decide when I want to work, and when I work, I get paid."). Indeed, he testified to having received $800 for three hours of work the week prior. Appellants now argue that the government violated *Brady* by failing to disclose the full extent of the benefits Bulgarian received at trial.

STANDARD OF REVIEW

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To prevail on a *Brady* claim, the defendant must show that the evidence was material. Materiality is satisfied when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). This Court reviews alleged *Brady* violations de novo. *United States v. Baker*, 658 F.3d 1050, 1053 (9th Cir.

[1] Horacio Yepiz was originally joined as a co-defendant of appellants, but was later deemed incompetent and tried separately.

2011), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012).

DISCUSSION

The government makes three arguments in support of its contention that it did not violate *Brady*: (1) defendants waived any *Brady* claim by failing to raise it at trial; (2) the allegedly withheld information would have been cumulative in light of other impeachment material provided to defendants; and (3) the record demonstrates that Bulgarian received these payments only after the trial in this case.

The government argues that defendants have waived their *Brady* claim by failing to raise it in the trial court. However, this Court has previously rejected this precise argument. In *United States v. Bracy*, undisclosed impeachment evidence of a government witness was uncovered for the first time in a later trial of a severed group of defendants. 67 F.3d 1421, 1428 (9th Cir. 1995). The information came to light only after the defendant had filed his notice of appeal, thereby divesting the trial court of jurisdiction over his case. *See generally Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). This Court concluded that "[i]t defies logic to suggest that [the defendant] waived a claim by not raising it before a court that lacked jurisdiction to consider it." *Bracy*, 67 F.3d at 1428. This reasoning applies with equal force here given that defendants appealed their case in early 2007, roughly two-and-a-half years before the new evidence was revealed.

Next, the government presents a litany of impeachment evidence that it produced to defendants, and argues that "additional payments information could hardly have caused the jury to view Bulgarian or his relationship with the government differently or with greater caution." To the

extent that the government argues that its duties under *Brady* only encompass disclosure of non-cumulative evidence, this Court has previously found this line of reasoning unavailing. *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997) ("We have held that the government cannot satisfy its *Brady* obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative.") (internal citations omitted). Moreover, failure to produce evidence (1) that Bulgarian made hundreds of thousands of dollars assisting law enforcement, and (2) enjoyed a relationship that allowed him to earn benefits whenever he chose, was material despite the effect of other impeachment evidence provided by the government. Indeed this evidence could very well have resulted in the jury disbelieving all of Bulgarian's testimony, which played an important role in the government's case. *Cf. Benn v. Lambert*, 283 F.3d 1040, 1058 (9th Cir. 2002) ("The undisclosed benefits that Patrick received added significantly to the benefits that were disclosed and certainly would have 'cast a shadow' on Patrick's credibility. Thus, their suppression was material.").

The government's attempts to minimize the significance of Bulgarian's testimony are not persuasive in light of the record. While some of Bulgarian's testimony was independently corroborated, it nonetheless played a substantial role in the government's case-in-chief. In particular, Bulgarian's testimony was relied upon heavily by the government to show that VBS was a "criminal enterprise" under RICO. Therefore, had the alleged *Brady* materials been made available to appellants at trial, there is a "reasonable probability" that the result of the proceeding would have been altered.

Finally, the government argues that the record conclusively shows that the benefits Bulgarian testified to receiving were all earned *after* appellants' trial, and therefore could not serve as the basis of a *Brady* violation. The government points to a discovery letter sent to Horacio Yepiz in August of 2009, informing him that since Bulgarian's testimony in this case in 2006, he had received an additional $80,000 to $90,000 from the government. However, Bulgarian testified that he may have received as much as $200,000 between 2004 and 2009; therefore a letter stating that he received roughly half that sum after appellants' trial in 2006 does not foreclose appellants' *Brady* claim.

The government concedes that the facts surrounding benefits paid to Bulgarian are "in dispute." Likewise, defendants admit that "there are fact-finding gaps in the record with regard to how much Bulgarian was paid, when he received payments, and the purpose of the payments." Defendants attempt to bridge these "gaps" by requesting that the court simply take judicial notice of Bulgarian's 2009 testimony at the trial of Horacio Yepiz. However courts may only take judicial notice of facts "not subject to reasonable dispute;" therefore the court **DENIES** defendants' motion. Fed. R. Evid. 201; *see also Lee v. City of L.A.*, 250 F.3d 668, 690 (9th Cir. 2001).[2]

[2] Defendants also request that this court take judicial notice of a complaint, verdict, and judgment in a state civil negligence case. Defendants have failed to adequately explain how these documents relate to any of their arguments on appeal, and how they meet the standard for judicial notice. MJN at 5 (citing JOB at 76–77). The Court therefore

In light of the disputed facts surrounding defendants' *Brady* claim, we **REMAND** to the district court so that it may engage in the necessary fact-finding to ascertain whether Bulgarian received benefits that were undisclosed to appellants at the time of trial, and if so, whether *Brady* was violated as to each convicted count.[3]

II. MANUEL YEPIZ'S SUBSTITUTION OF COUNSEL CLAIM

BACKGROUND

Following Manuel Yepiz's ("Yepiz") arrest in June 2005, an attorney named Bernard Rosen was appointed to represent him. In November 2005, Yepiz retained Nicolas Estrada to replace Rosen. On April 9, 2006, Yepiz wrote a letter addressed "to the Honorable Judge Walters," which the court received on April 11, 2006. In the letter, Yepiz expressed "great concern" about "financial differences" he was having with Estrada. He stated that Estrada had asked him for $200,000 to proceed to trial, despite having told Yepiz and his family he would only charge an additional $25,000 to $35,000 for trial. He stated that if Estrada "would

---

DENIES defendants' motion for judicial notice as to these documents as well.

[3] At oral argument, the government conceded that defendants should have an opportunity to litigate their *Brady* claims by collaterally attacking their conviction under 28 U.S.C. § 2255. However, the government points to no opinion of this Court holding that a post-conviction motion under § 2255 is preferable to a remand. Indeed, the government stated at oral argument that "it doesn't make much difference" what mechanism is used. Moreover, defendants would not enjoy the benefit of counsel in a § 2255 proceeding. Given that counsel for defendants are already familiar with the facts surrounding the *Brady* issue, the interests of justice and judicial efficiency militate in favor of remanding to the district court.

have been more truthful from the start, [he] would have never hired [Estrada]," because his family could not afford him. Finally, Yepiz noted that he did not want to "waste everybodys [sic] time by waiting [until] the last minute to ask for a new attorney," that he had only recently been informed of Estrada's prices, and that he was thus requesting a "panel attorney" now, so that he or she could "prepare for trial and [have] everything [go] as schedule[d]."

The court did not accept Yepiz's letter, and instead ordered the letter "returned to counsel" along with a Notice of Document Discrepancies (NDD). A checked box at the bottom of the NDD stated that Yepiz's letter was "**NOT** to be filed, but instead **REJECTED**." The NDD did not indicate the basis for the court's rejection, and the docket description of the document only indicated that the denial was based on the fact that "[p]arties should not write letter[s] to Judge." Yepiz and Estrada subsequently appeared before the court on May 9, 2006 for a hearing on a motion to suppress evidence, though neither Yepiz nor Estrada reasserted Yepiz's motion for substitution of counsel.

On July 25 and 31, Yepiz wrote two additional letters addressed to Judge Walter asking for an "in camera hearing" to "request the Court to appoint new counsel" on his behalf. He raised several concerns in his letters regarding Estrada's representation, and the court scheduled a hearing for August 4, 2006 to address them. At the hearing, the court stated that it had received "two letters from the defendant," referring to those letters dated July 25 and July 31. It did not reference Yepiz's April 9 letter. After discussing several of Yepiz's concerns, the following exchange took place between Yepiz and Judge Walter:

> **Yepiz**: Okay, Your Honor. And then another thing. I addressed the Court—I wrote this

> letter on April 9th—yes, I believe April 9th. I have it right here. It was returned, it was signed by, I believe, you and returned.[4] Right here I'm asking for a lawyer because I'm already having problems with [Estrada] as of April 9th. This is not something that happened last week or a few weeks ago, [Y]our Honor, this has been going on. . . . This is a whole letter right here signed by you, yourself, [Y]our Honor, I have it right here in front of me.
>
> **The Court**: Well, I didn't sign any letter.
>
> **Yepiz**: Well, it's right here.
>
> **The Court**: I didn't sign your letter.
>
> **Yepiz**: You didn't sign—oh, you signed the copy of it.
>
> **The Court**: Your letter that you're saying that I signed.
>
> **Yepiz**: My letter, I apologize, you know, I'm not the brightest car in the lot.
>
> **The Court**: All right. Anything else?

[4] While the NDD stipulated that the letter should be returned to counsel, based on Yepiz's statements, he was aware that the letter had been returned, either because it had been returned directly to him, or because Estrada informed him that it had been returned.

The court then briefly questioned Yepiz about his July 25 letter, but never again acknowledged Yepiz's April 9 letter. The court held that "the issues raised ha[d] been adequately addressed by counsel" and that Yepiz's requests for substitution were "untimely, as [they had been] filed on the eve of trial." The court further stated that because it had received four or five letters from several of Yepiz's co-defendants who were "all housed together at [a correctional facility]," they amounted to "nothing more than a strategic attempt to delay the trial." Because it found that a substitution "would necessitate a continuance" of the trial, the court denied Yepiz's request.

On September 20, 2006—the 23rd day of trial—Yepiz sent a fourth letter to the court that was addressed to Judge Walter. The letter raised several "concerns as to [Yepiz's] attorney and his representation." Among other things, it stated that Estrada would not spend $60 to copy a videotape of Yepiz's arrest and that he feared Estrada had "lost interest to defend [him]" because he had "run out of money." He stated that Estrada was "constantly harass[ing]" him for money and his family was "selling their house to pay him," but that Estrada's response was "no money [no] defense." Interpreting Yepiz's letter as a request for substitution of counsel, the court scheduled a hearing for three days later, where Yepiz clarified that the letter was actually "just a request to get the video" from Estrada, and Estrada agreed to produce it.

STANDARD OF REVIEW

"We review a district court's denial of a motion for substitution of counsel for abuse of discretion." *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010). Unlike "most substitution cases" that "arise when an indigent defendant requests new court-appointed counsel in

place of an existing appointed attorney," the present appeal concerns a defendant's request to replace retained counsel with appointed counsel. *Id.*

The Sixth Amendment provides that, [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right "encompasses two distinct rights: a right to adequate representation" for all defendants and, for defendants who have retained their own attorney, the right "to be represented by the attorney of [their] choice." *Rivera-Corona*, 618 F.3d at 979 (emphasis omitted). The right to counsel of choice includes the constitutional "right to discharge retained counsel," and a defendant may generally do so "for any reason or no reason" so long as "the substitution would [not] cause significant delay or inefficiency or run afoul of . . . other considerations," such as the "fair, efficient and orderly administration of justice." *United States v. Brown*, 785 F.3d 1337, 1340, 1344, 1345, 1346 (2015); *Rivera-Corona*, 618 F.3d at 980–81. "[D]enial of a defendant's right to counsel of choice is a structural error, requiring that convictions be vacated even without a showing of prejudice." *Brown*, 785 F.3d at 1350. Where a "court allows a defendant to discharge his retained counsel and the defendant is financially qualified, the court must appoint new counsel for him under the Criminal Justice Act" (CJA), at any stage of the proceedings. *Id*. at 1340; 18 U.S.C. § 3006A.

DISCUSSION

Yepiz claims the district court abused its discretion when it failed to inquire into his April letter seeking to replace Estrada with court-appointed counsel. We agree. Under this court's precedent, "the trial judge had a duty to inquire into the problems between" Yepiz and Estrada "when they were

first raised." *Blacketter*, 525 F.3d at 896. The court here failed to conduct any inquiry with regard to Yepiz's April letter, though it clearly understood it was bound by such a duty given the speed with which it scheduled hearings regarding Yepiz's July and September letters, each of which were similarly addressed directly to Judge Walter. Yepiz's failure to submit his letter through the very counsel he was hoping to discharge, does not negate the court's duty.

As an initial matter, the government argues that the court need not have addressed Yepiz's request because it was not properly filed. According to the government, Yepiz's letter was rejected and not filed because it did not comply with Local Rules 83-2.9.1 and 83-2.11. Those rules prohibit parties who are represented by counsel from acting *pro se* and from communicating with the judge via letters or phone calls. *See* C.D. Cal. Civ. L-R 83-2.9.1 & 83-2.11. The NDD rejecting Yepiz's letter, however, made no mention of these local rules. Indeed, no reason for the rejection was provided on that form. It was only on the electronic version of the docket that any explanation was provided: "[p]arties should not write letter [sic] to Judge." Thus, no clear explanation as to why Yepiz's letter was rejected was ever presented to Yepiz's counsel, and because the letter and NDD were sent to Yepiz's counsel and not to Yepiz, Yepiz was given no explanation at all.

Had such an explanation been given to Yepiz, he would have been in a position to properly comply with the local rules: he could have requested that his counsel file a motion asking to withdraw, a motion which his counsel would have been ethically obligated to file. Alternatively, Yepiz could have filed another letter explaining why he was unable to comply with the rules—perhaps his counsel was unwilling or unable to comply with his ethical obligations to file a

motion to withdraw, or perhaps Yepiz was unable to contact his counsel at all. Because no explanation was provided, Yepiz was not given notice as to how he could properly present his request for new counsel, and as such, the local rules served to arbitrarily deny Yepiz's constitutional rights. Under the circumstances of this case, therefore, we reject the government's argument that the court was excused from its duty to inquire into Yepiz's request because of Yepiz's failure to comply with any local rule of procedure.

The government also argues that Yepiz waived his Sixth Amendment right to counsel when he failed to reassert his substitution motion at the May suppression hearing. *See United States v. Taglia*, 922 F.2d 413, 416 (7th Cir. 1991) (stating that "[i]f a motion is not acted upon, a litigant had better renew it. He may not lull the judge into thinking that it has been abandoned and then, after he has lost, pull a rabbit out of his pocket in the form of the forgotten motion."). However, the record does not support the government's claim of waiver.

A constitutional right may generally only be waived "if it can be established by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent," and we must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Schell v. Witek*, F.3d 1017, 1024 (9th Cir. 2000). In *Schell*, we held that the defendant did not voluntarily, knowingly, and intelligently waive his right to counsel when he failed to reassert a request for substitution that the court had overlooked. *Id.* Instead, we found that because Schell's attorney had advised him that his motion "must have been denied" and there was "nothing in the record to suggest that Schell knew of the court's inadvertent error," he could not have waived the request. *Id.* While this case presents a slightly different scenario in that

we do not know why Yepiz failed to reassert his motion at the May hearing, our conclusion is the same.

In this case, Yepiz sent his first letter to the court in April 2006, which the court rejected. He then sent two additional letters addressed to Judge Walter requesting substitution of counsel in July 2006. At a hearing to address the July letters, Yepiz stated that the issues he was having with Estrada were "not something that had just happened last week," but had instead "been going on" since April. In his September letter, Yepiz stated that "[d]uring a conversation in April 2006, I explained I had no more money . . . [and] [w]e agreed that [Estrada] would withdraw from the case. However, he still remains and I am being repeatedly harassed for money." Yepiz's consistent statements that his issues with Estrada had not been resolved suggest that Yepiz did not voluntarily, knowingly, or intentionally waive his motion.

This conclusion is supported by the fact that the NDD failed to put Yepiz on notice that the letter was rejected or how he might rectify the deficiency. For all he knew, as in *Schell*, the motion "must have been denied." *Schell*, 218 F.3d at 1024. We therefore hold that Yepiz did not waive his motion.

While it may sometimes be necessary to remand a case such as this to the district court in order to determine whether substitution of counsel would have "caused significant delay" or impeded the "fair, efficient and orderly administration of justice," the record here is sufficiently clear to determine, without remanding, that replacing Estrada would not have implicated these concerns. *Blacketter*, 525 F.3d at 896. The court received Yepiz's April 2006 letter four months prior to the start of trial. In the letter, Yepiz stated specifically that he "did not want to delay the trial," and merely wanted to "have the time to get a new

lawyer to defend [him] properly," as provided by the Constitution. *Id*. The district court later suggested that "five weeks would have been sufficient time" for a substitute attorney to prepare a defense for a different defendant joined in Yepiz's case, and any counsel appointed to represent Yepiz would have had months to prepare for trial. Because the substitution would not have affected the court's calendar, Yepiz was entitled to discharge Estrada "for any reason or no reason." *Blacketter*, 525 F.3d at 896. If Yepiz still qualified as an indigent defendant at the time he sent his April letter, he was also statutorily entitled to appointed counsel under the CJA. *Brown*, 785 F.3d at 1346.

We therefore find that the district court abused its discretion when it arbitrarily and without explanation rejected Yepiz's April 2006 letter. Given the defects in the district court's handling of Yepiz's requests, we **VACATE** Yepiz's conviction and **REMAND** for a new trial. *Brown*, 785 F.3d at 1350.

NGUYEN, Circuit Judge, dissenting in part:

While represented by competent retained counsel, Manuel Yepiz sent a pro se letter to the district court. Because the court's local rules prohibit, among other things, represented parties from communicating with the court pro se, his letter was not filed. Instead, the court returned the letter to Yepiz's counsel along with notice of the reason for the rejection. Importantly, Yepiz's letter doesn't suggest any dissatisfaction with his attorney's representation, only with its cost. Yet the majority holds that the court's failure to consider the letter is structural error requiring automatic reversal of Yepiz's conviction. I respectfully dissent.

The majority's ruling invalidates not only well-established local rules in the Central District of California, but similar rules in every district in the Ninth Circuit. More troubling, however, is the majority's refusal to engage in harmless error analysis. A request for appointed counsel implicates the Sixth Amendment's guarantee of effective assistance, not choice, of counsel, regardless of whether the attorney whom the criminal defendant seeks to replace was retained or appointed. Consistent with other effective-assistance cases, Yepiz's conviction should be affirmed unless he can show prejudice. There was no such showing here. Indeed, counsel continued to represent Yepiz competently throughout the extensive proceedings in this case, including pretrial hearings, trial, and sentencing. By finding structural error and vacating the conviction, the majority brings us seriously out of step with the Supreme Court's Sixth Amendment jurisprudence.

I.

I agree with the majority that the Sixth Amendment claim turns on Yepiz's April 2006 handwritten letter to the district court regarding his retained attorney, Nicolas Estrada.[1] In the letter, Yepiz did not express concern about Estrada's competence or any other aspect of his performance. To the contrary, the letter was premised

[1] Yepiz sent four letters to the court regarding Estrada. The first, at issue here, was sent in April 2006. Yepiz followed up with two more in July, and a fourth letter in September after trial had begun. I agree with the majority that the denial of the July and September requests for substitution of counsel were justified. *See, e.g.*, *United States v. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991) ("We have consistently held that a district court has broad discretion to deny a motion for substitution made on the eve of trial if the substitution would require a continuance." (citing *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986))).

entirely on "financial differences" that developed between Yepiz and Estrada. Yepiz wrote that he "need[ed] a Panel attorney" because Estrada had only recently informed him of the representation's "financial cost."

The court "rejected" the letter for filing and returned it to counsel for failure to comply with the district court's local rules. Those rules prohibit a party from "writing letters to . . . or otherwise communicating with a judge in a pending matter unless opposing counsel is present" and require "[a]ll matters [to] be called to a judge's attention by appropriate application or motion." C.D. Cal. L.R. 83-2.11 (2006). The rules also prohibit a represented party from acting pro se. C.D. Cal. L.R. 83-2.9.1 (2006). It appears that the letter may have been bounced by court staff without the judge's involvement.[2] At a later hearing in which Yepiz recounted the letter, the district judge gave no indication that he had seen it.

The district court sent a notice of discrepancy to Estrada informing him that filing was rejected, along with a copy of the letter. The electronic docket entry noted the reason for the rejection as "[p]arties should not write letter [*sic*] to

[2] Federal Rule of Civil Procedure 5(d)(4) prohibits the *clerk* from refusing to file a paper solely for noncompliance with a local rule, but such orders can be entered at the direction of a *judicial officer*. *E.g.*, *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002); *see* Fed. R. Civ. P. 5(e) advisory committee's note to 1991 amendment ("The enforcement of these rules and of the local rules is a role for a judicial officer."). It's unclear whether Judge Walter saw the letter and rejected the filing, he delegated that duty, or, if his usual practice was to set a hearing, a clerk inadvertently failed to comply. That Judge Walter's signature is on the notice of discrepancy doesn't definitively tell us the answer as most judges have signature stamps for their courtroom deputy's use.

judge." In short, the district court promptly alerted Estrada that the letter was not filed and gave him a copy of it so that he would know the exact nature of his client's complaint. It appears that Estrada discussed the matter with his client because, at a subsequent hearing, Yepiz stated that he had a copy of the "returned" letter "signed by" the court (presumably referring to the notice of discrepancy).

Yet for three months after filing was rejected, neither Yepiz nor defense counsel raised any concerns. Estrada continued to represent Yepiz, filing a reply in support of his motion to suppress wiretap evidence and appearing alongside him at the hearing. Throughout that time Estrada never filed a motion to withdraw or a request for substitution.

II.

The majority acknowledges that the letter was neither filed nor considered on the merits. It concludes, however, that because the district court presented "no clear explanation as to why Yepiz's letter was rejected" to Yepiz or to this attorney, the local rules "served to arbitrarily deny Yepiz's constitutional rights." Slip Op. at 19–20. I disagree.

For one thing, the docket entry plainly states that the letter was rejected "based on: [p]arties should not write letter [*sic*] to judge." Estrada received this notice. *See* C.D. Cal. L.R. 5-4.1.4(4). Moreover, because "familiarity with [the] Local Rules [is] a prerequisite to admission to practice in the Central District," *Moore v. La Habra Relocations, Inc.*, 501 F. Supp. 2d 1278, 1279 (C.D. Cal. 2007) (citing C.D. Cal. L.R. 83-2.2.2 (2006)), Estrada was expected to know that those rules prohibited represented parties from writing letters directly to the judge. He certainly would have

known that the Federal Rules of Civil Procedure require motions to be served on opposing counsel. Fed. R. Civ. P. 5(a)(1)(D).

Once Estrada learned that his client might want to discharge him, he had a duty to promptly discuss the issue with Yepiz and, if Yepiz indeed had that intent, to honor it. An attorney has an ethical obligation to seek substitution or withdrawal if his client wants the representation to end. *See, e.g.*, *Fracasse v. Brent*, 6 Cal. 3d 784, 790 (1972) ("[T]he client's power to discharge an attorney, with or without cause, is absolute." (citation omitted)); *see also* Cal. Bus. & Prof. Code § 6068(m) (requiring attorneys "to keep clients reasonably informed of significant developments"); Cal. R. of Prof'l Conduct, R. 3-500 (same).

"[T]he attorney is in the best position to determine when a conflict exists and so 'defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.'" *United States v. Elliot*, 463 F.3d 858, 866 (9th Cir. 2006) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 485–86 (1978)). Attorneys routinely bring their clients' requests to discharge counsel or potential conflicts to the court's attention, including in the cases relied upon by Yepiz and the majority. *E.g.*, *United States v. Brown*, 785 F.3d 1337, 1341–42 (9th Cir. 2015) ("[Defense counsel] advised the court [in a written motion] that Brown 'desire[d] counsel to withdraw from representing him . . . .'"); *United States v. Rivera-Corona*, 618 F.3d 976, 977–78 (2010) ("[Retained counsel] moved to withdraw [after his client expressed a loss of faith in him] and requested that new counsel be appointed."); *Miller v. Blacketter*, 525 F.3d 890, 892 (9th Cir. 2008) (filing withdrawal motion on the day after the defendant "left a message on [counsel's] home answering machine stating

that he was no longer comfortable with her representation and . . . wanted a new lawyer"). There is no reason to think Estrada would not have done the same thing here if Yepiz remained intent on firing him.

For all we know, Yepiz and Estrada may have temporarily resolved their financial differences after Yepiz's letter was rejected. If so, then we must "presume that counsel [continued] to execute his professional and ethical duty to zealously represent his client, notwithstanding the fee dispute." *United States v. O'Neil*, 118 F.3d 65, 71 (2d Cir. 1997). We should assume that Estrada fulfilled his duties given the "'strong presumption' that an attorney's conduct was professionally competent." *Frazer v. United States*, 18 F.3d 778, 786 (9th Cir. 1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Nothing in Yepiz's April 2006 letter suggested that Estrada was unwilling to end the representation or that there was any other conflict that might have warranted the district court's intrusion into the attorney-client relationship. In Yepiz's next two letters to the district court, written three months later, he did not even mention the fee issue. By vacating Yepiz's conviction without knowing why he never renewed his request as a formal substitution motion, the majority flips the presumption that Estrada was competent on its head.[3]

[3] As stated, Yepiz knew that his letter was rejected. But the majority appears to assume that Estrada failed to notify Yepiz in a timely manner or refused to honor a request to withdraw. Even if true, Yepiz had a remedy: he could allege ineffective assistance of counsel. Of course, we usually do not consider such claims on direct appeal because the record is inadequate to evaluate them. *See, e.g.*, *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011). But that's all the more reason why we shouldn't disturb the conviction in these proceedings.

Today's decision will place tremendous strain on our already overburdened district courts. The majority's holding means that district courts can't enforce local rules prohibiting represented parties from writing pro se letters to the judge. Such rules exist in every district court throughout the Ninth Circuit. *See* D. Alaska Civ. R. 11.1(a)(1)(3)[A]; D. Ariz. Civ. R. 83.3(c)(2); N.D. Cal. Civ. R. 11-4(c); S.D. Cal. Civ. R. 83.9; D. Guam Gen. R. 19.1(a); D. Haw. R. 83.6(a); D. Idaho Civ. R. 83.6(a)(2); D. Nev. R. IA 11-6 (a); D. N. Mar. I. Civ. R. 83.5(g)(1); D. Or. Civ. R. 83-9(b); E.D. Wash. R. 83.2(d)(2); W.D. Wash. Civ. R. 83.2(b)(4).[4] In fact, we enforce similar rules in our own court, *see, e.g.*, *United States v. Noriega-Perez*, 467 F. App'x 698, 703 (9th Cir. 2012); *United States v. Ortiz-Martinez*, 593 F. App'x 649, 650 (9th Cir.) (rejecting pro se filing seeking new counsel), *cert. denied*, 135 S. Ct. 2912 (2015), as do other circuits, *see, e.g.*, *United States v. Hunter*, 770 F.3d 740, 746 (8th Cir. 2014) ("It has long been Eighth Circuit policy 'that when a party is represented by counsel, we will not accept pro se briefs for filing.'" (quoting *United States v. Payton*, 918 F.2d 54, 56 n.2 (8th Cir. 1990))).

Until today, we have always afforded district courts great discretion in enforcing these rules because "[a] criminal defendant does not have an absolute right to both self-representation and the assistance of counsel." *United States*

[4] The Eastern District of California does not have a specific rule except for capital habeas petitioners, E.D. Cal. R. 191(c), but its rules cite "letters to the Court not suitable for filing" as an example of "received" documents that are "not . . . part of the official record in the action," E.D. Cal. R. 101. The District of Montana implies such a rule for represented criminal defendants: "When the right to counsel no longer applies in this court, pro se filings may not be dismissed or stricken on the grounds that the filer was represented by counsel." D. Mont. Crim. R. 44.1.

v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981). Of course, district courts can't turn a blind eye to conflicts between a criminal defendant and defense counsel under the guise of procedure. When the court is aware of a conflict that potentially could affect a defense counsel's representation, it has a duty to inquire further. *E.g.*, *Garcia v. Bunnell*, 33 F.3d 1193, 1199 (9th Cir. 1994). But "not every conflict or disagreement between the defendant and counsel implicates Sixth Amendment rights." *Schell v. Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000) (en banc) (citing *Morris v. Slappy*, 461 U.S. 1, 13–14 (1983) (rejecting "the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel")).

Yepiz expressed no concern about Estrada's performance. He did not suggest that counsel's representation would suffer as a consequence of their financial dispute. I agree that because he asked for appointed counsel, the more prudent course would have been for the district court to exercise its discretion and take up his complaint. But the failure to do so under these circumstances is not per se reversible error. By concluding that structural error occurs when a district court fails to inquire into a single pro se letter that is returned to counsel, the majority effectively requires district judges to review and entertain *all* pro se filings submitted by every single represented criminal defendant. This is no small task. For many of our district courts that handle massive criminal dockets, receiving pro se letters is a routine matter. Some defendants in custody are prolific letter writers and, without counsel's help, their messages may be prolix and inscrutable. District courts, no longer safe to rely on the defense bar's professionalism in raising client concerns, will now be pressed to hold hearings whenever criminal defendants write

to them on differences with their counsel, regardless of how seemingly minor.

III.

The majority's assignment of error to the district court's routine handling of a pro se communication wouldn't be nearly so pernicious if not for its failure to assess harmlessness. Guided by our precedents—which I believe were wrongly decided—the majority holds that when a district court erroneously denies a motion to substitute retained counsel with appointed counsel, it commits structural error. The mistake in this approach stems from confusion about the right at issue.

"The Sixth Amendment's right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one's own counsel." *Rivera-Corona*, 618 F.3d at 979 (quoting *Daniels v. Lafler*, 501 F.3d 735, 738 (6th Cir. 2007)). These rights are distinct because they arise from different sources. The right to effective counsel is derived from the Due Process Clause's fair trial guarantee and incorporated into the Sixth Amendment based on "our perception that representation by counsel 'is critical to the ability of the adversarial system to produce just results.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (quoting *Strickland*, 466 U.S. at 685). Because the limits of this right are also derived from the goal of a fair—"not mistake-free"—trial, "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *Id.* (citing *Strickland*, 466 U.S. at 685).

"The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's

purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147–48 (footnote and citations omitted). "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Id.* at 148. Although the right to choice of counsel is subject to qualifications, *see Wheat v. United States*, 486 U.S. 153, 159 (1988), the improper denial of that right, including the right not to have counsel, *see Faretta v. California*, 422 U.S. 806, 821 (1975), is structural error subject to automatic reversal. *Gonzalez-Lopez*, 548 U.S. at 152; *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008).

Here, Yepiz did not seek to *retain* a particular lawyer or proceed pro se. He asked the district court to *appoint* counsel. His request was grounded not in the Sixth Amendment's right to counsel of choice but rather in its "right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice." *Gonzalez-Lopez*, 548 U.S. at 146; *see Wheat*, 486 U.S. at 159 ("[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."). The Supreme Court has cautioned us not "to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez*, 548 U.S. at 148.

In *Rivera-Corona*, the panel cited *Bland v. California Department of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017, 1024–25 (9th Cir. 2000) (en banc), for the proposition that a defendant's request to substitute appointed counsel in place of a retained attorney "implicate[s] the qualified right to choice of counsel." 618 F.3d at 981. I don't read *Bland* as holding that, let alone "unequivocally" so. *Rivera-Corona*, 618 F.3d at 981. At issue was the "right to *discharge* counsel," *Bland*, 20 F.3d at 1472 (emphasis added), not the right to have new counsel appointed. Bland's retained attorney moved unsuccessfully "to be relieved as counsel." *Id.* at 1475 (emphasis omitted). We affirmed habeas relief based on the trial court's denial of that motion. *Id.* at 1472. Although Bland's retained attorney also expressed his client's wish to have new counsel appointed, *id.* at 1475, that request wasn't at issue because the trial court ultimately appointed counsel when the retained attorney failed to appear at sentencing. *Id.*

Admittedly, we inconsistently framed the issue as both the right to choice of counsel (which wouldn't require a showing of prejudice) and the right to effective assistance (which would). But it made no difference how Bland's right was characterized because he "established the requisite prejudice" in any event. *Id.* at 1479. In pointing out that "the Sixth Amendment . . . protects [Bland's] qualified right to obtain *retained* counsel of his choice," we "assume[d] Bland was not indigent." *Id.* at 1477 (emphasis added).

As we explained in *Schell*, the right to choice of counsel is not implicated by an indigent defendant's request for appointed counsel: "The qualified right of choice of counsel applies *only* to persons who can afford to retain counsel." 218 F.3d at 1025 (emphasis added). In *Gonzalez-Lopez*, the

Supreme Court echoed this principle, stating that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." 548 U.S. at 151.

The error in *Rivera-Corona* was compounded in *Brown*, which held that the erroneous denial of a motion to substitute retained counsel with appointed counsel "is a structural error, requiring that convictions be vacated even without a showing of prejudice." 785 F.3d at 1350 (citing *Gonzalez-Lopez*, 548 U.S. at 150). The panel acknowledged "that it is not, strictly speaking, correct to say that the defendant in *Rivera-Corona*, or [Brown], was entitled to, or seeking, *counsel of choice*." *Id.* at 1344. Nevertheless, the panel concluded that the district courts were "really deciding two issues. The first, whether the defendant may *discharge* the attorney whom he retained, implicates the Sixth Amendment right to counsel of choice . . . . [A]t the same time, [the courts were] also considering a request for *appointment* of counsel." *Id.* at 1344–45. Since the first issue involves a right that if violated requires automatic reversal, *Brown* concluded that the ultimate decision was also subject to automatic reversal if erroneous. *Id.* at 1350.

Whatever the logic of that proposition in general, it makes no sense to apply it when the substitution request is for purely financial reasons. The defendant doesn't want to fire his retained counsel independently of having new counsel appointed. The former is incidental to the latter. *See United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004) ("[T]he two [analyses] merge, since defendant and his family ran out of funds to retain other private counsel and defendant sought court appointed counsel."). Here, had the district court found Yepiz indigent and appointed Estrada to continue representing him at public expense, the majority presumably would find no error. *See* C.D. Cal. Gen. Order

13-09 (allowing for appointment of counsel not on Criminal Justice Act Panel to ensure continuity of representation and preserve the interests of economy). Then why find per se reversible error when the consequence of the court's purported error was the continued representation by Estrada? The majority doesn't say.

Before *Rivera-Corona* and *Brown* led us astray, we treated motions to substitute retained counsel with appointed counsel under the standard for appointing new counsel because that was the crux of the request. *Bland* held that "[w]hen reviewing the denial of a motion to substitute [retained with appointed] counsel for abuse of discretion, we consider . . . three factors: '(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense.'" 20 F.3d at 1475 (quoting *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990)). *Schell*, though overruling *Bland*'s application in habeas cases as insufficiently deferential, confirmed that the standard applied in *Bland* "is the correct methodology for reviewing federal cases on direct appeal." 218 F.3d at 1025 (citing *Walker*). Yet *Rivera-Corona* wrongly held that "the extent-of-conflict review is inappropriate" when a defendant seeks to replace retained with appointed counsel. 618 F.3d at 981. *But see Martel v. Clair*, 132 S. Ct. 1276, 1287 (2012) (explaining that review of substitution motions "generally include[s]" factors such as "the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)"). *See generally*

Rivera-Corona, 618 F.3d at 983–87 (Fisher, J., disagreeing that *Bland* and *Schell* were not controlling but concurring in the result). By wholly conflating two distinct rights—the right to counsel of choice and the right to effective counsel—*Rivera-Corona* and *Brown* forged structural error from harmless mistake.

IV.

This case illustrates why a conviction shouldn't be set aside when the district court erroneously denies a request to substitute retained with appointed counsel absent a showing of prejudice. Midway through trial, the district court held a hearing to discuss Yepiz's most recent complaints about Estrada. The court made specific findings that Estrada had continued throughout the proceedings to competently represent Yepiz, that he had "participated in the trial," "made objections . . . at the appropriate time," and "properly cross-examined witnesses that ha[d] anything to say that relate[d] to [Yepiz]." Critically, the court found that Yepiz and Estrada "[could] continue to work out" defense strategy. None of these findings is consistent with "the conflict between the defendant and his attorney [being] so great that it resulted in a total lack of communication preventing an adequate defense." *Bland*, 20 F.3d at 1475. In other words, there is no evidence of prejudice.

I respectfully dissent.

APPENDIX B

NOT FOR PUBLICATION

FILED

DEC 20 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MANUEL YEPIZ, aka's Martin Sanchez; et al., Defendant - Appellant.	No. 07-50051 D.C. No. CR-05-00578-JFW-7 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOSE LUIS MEJIA, a/k/ Jose Luiz Mejia, Jose Nernedes, Juan Martinez, Jose Mejia, Check Mejia, Jose Al Mejia, Joe Morin, Jose L. Mejia, "Checho", "Joe" and "Cheech", Defendant - Appellant.	No. 07-50062 D.C. No. CR-05-00578-JFW-37

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FRANCISCO ZAMBRANO, a/k/a Franky Boy and "Franky", Defendant - Appellant.	No. 07-50063 D.C. No. CR-05-00578-JFW-35

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JESUS CONTRERAS, aka Jessie Contreras; et al., Defendant - Appellant.	No. 07-50067 D.C. No. CR-05-00578-JFW-21

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MARIANO MEZA, Defendant - Appellant.	No. 07-50070 D.C. No. CR-05-00578-JFW-44

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SERGIO MEJIA, aka Robert Mesa; et al., Defendant - Appellant.	No. 07-50098 D.C. No. CR-05-00578-JFW-36

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GILBERTO CARRASCO, a/k/a GILBERTO CARRASCO, JR.; et al., Defendant - Appellant.	No. 07-50133 D.C. No. CR-05-00578-JFW-22

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ERNESTO OROZCO MENDEZ, a/k/a "GORDO", "EL GORDO", ERNESTO MIJARES, ERNESTO MENDOZA MIJARES, ERNESTO MENDOZA OROZCO (Birth Name), Defendant - Appellant.	No. 07-50142 D.C. No. CR-05-00578-JFW-31

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RAFAEL YEPIZ, Defendant - Appellant.	No. 07-50264 D.C. No. CR-05-00578-JFW-1

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 7, 2015
Pasadena, California

Before: REINHARDT, NOONAN, and NGUYEN, Circuit Judges.

Appellants—Manuel Yepiz, Jose Luis Mejia, Francisco Zambrano, Jesus Contreras, Mariano Meza, Sergio Mejia, Gilberto Carrasco, Rafael Yepiz, and Ernesto Mendez—are all alleged members of the Vineland Boys gang ("VBS") and timely appealed their convictions and sentences. The court has concurrently filed an opinion addressing appellants' joint *Brady* claims and Manuel Yepiz's Sixth Amendment Right to Counsel claim. This memorandum disposition addresses the remaining issues before the court.

I. VOIR DIRE

During voir dire, juror sidebars were held in a jury room adjacent to the courtroom with counsel and a court reporter. The district court found that it was impossible to move the defendants to the jury room without the prospective jurors noticing their shackles, and therefore ordered that they remain seated in the courtroom at all times. The district court also found that it was equally infeasible to clear the courtroom each time a prospective juror needed to be questioned privately. Defense counsel were permitted to leave at any point to confer with their clients, but the defendants were not permitted in the jury room. General voir dire questions of a non-sensitive nature were conducted in open court. However, issues relating to bias or prejudice, and some hardship questions were discussed in the jury room. The court interviewed 94 potential jurors, 77of whom were, at some point, questioned in the jury room. Thirty jurors were questioned only as to hardship or publicity, and 47 were questioned as to other topics—primarily bias or prejudice. Appellants contend that this procedure violated (1) their right to be present at trial, and (2) their right to a public trial. "Although we review the district court's conduct of voir dire for abuse of discretion, questions of law that arise during the course of voir dire are reviewed de novo." *United States v. Reyes*, 764 F.3d 1184, 1188 (9th Cir. 2014) (internal citations omitted).

The voir dire procedures fashioned by the district court did not violate defendants' constitutional right to presence, which must at times yield to the "day-to-day realities of courtroom life," as well as "society's interest in the administration of criminal justice." *Rushen v. Spain*, 464 U.S. 114, 119 (1983). In this case, the district court provided defendants as much ability to observe prospective jurors and participate in the voir dire process as possible in light of the countervailing considerations of security, juror privacy, and courtroom logistics. We therefore cannot say that "a fair and just hearing [was] thwarted by" defendants' absence from certain portions of voir dire. *Snyder v. Com. of Mass.*, 291 U.S. 97, 107–08 (1934); *cf. Rice v. Wood*, 77 F.3d 1138, 1145 (9th Cir. 1996); *Reyes*, 764 F.3d at 1190.

Assuming *arguendo* that the voir dire procedures violated defendants' statutory right to be present under Federal Rule of Criminal Procedure 43, we hold that the error was harmless because "there is no reasonable possibility that prejudice resulted from the [defendant's] absence." *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002) (quoting *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986)); *see also United States v. Bordallo*, 857 F.2d 519, 523 (9th Cir. 1988).

Defendants never argued that the voir dire procedures violated their right to a public trial before the trial court. This claim is therefore forfeited on appeal. *Freytag v. C.I.R.*, 501 U.S. 868, 896 (1991); *United States v. Cazares*, 788 F.3d 956, 971 (9th Cir. 2015).

II. PRETRIAL PUBLICITY

At the close of trial, the district court denied defendants' motion for a mistrial based in part on juror exposure to pretrial publicity. The motion claimed that an article published by the *Daily News* entitled "Vineland Boys About to Face Judgement Days" violated defendants' Sixth Amendment right to a trial by an impartial jury. A trial court's finding of impartiality may be overturned only for manifest error. *Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991). "[P]retrial publicity, even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). The exposure to pretrial publicity in this case bears little resemblance to the extreme cases that have given rise to a violation of the right to an impartial jury. *Compare Skilling v. United States*, 561 U.S. 358 (2010), *with Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Accordingly, we find that the publicity in this case does not implicate the Sixth Amendment.

III. BATSON

During voir dire on August 22, 2006, the government exercised a peremptory challenge against Juror number 6, a Hispanic male. Defendants objected, arguing that the government exercised its peremptory on the basis of the juror's race. The district conducted a *Batson* analysis and concluded that the government's reasons constituted a credible, race-neutral basis for striking Juror 6, and accordingly overruled the objection. Defendants now contend that the district court erred. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

Defendants argue that the district court's failure to engage in a comparative analysis on the record amounts to procedural error that is *per se* reversible. *See generally Ali v. Hickman*, 584 F.3d 1174, 1184 (9th Cir. 2009). However, this court has recently rejected this precise argument. *Murray v. Schriro* 745 F.3d 984, 1005 (9th Cir. 2014).

Defendants further argue that in rejecting their *Batson* objection to Juror 6, the district court improperly considered the fact that defendants would have the opportunity to have other Hispanic individuals on the jury because three of the next nine potential jurors to be questioned were Hispanic. As an initial matter, defendants cite no case supporting the proposition that this would constitute

reversible error. Moreover, it was defense counsel—not the trial court—that initially commented on the ethnicity of the potential jurors to be questioned. Read in context, the district court's remarks were merely a response to counsel's comment and played no part in its *Batson* analysis.

IV. ANONYMOUS JURY

Contreras and Mendez contend that the district court empaneled an anonymous jury without providing the proper safeguards to protect their constitutional rights to a fundamentally fair trial and their presumption of innocence. Because neither Contreras's nor Mendez's attorneys objected to the empaneling of an anonymous jury below, we review for plain error. *See United States v. Marcus*, 560 U.S. 258 (2010).

While this circuit has never explicitly stated which factors make a jury anonymous, the Seventh Circuit has held that empaneling an anonymous jury "requires withholding, at least, the jurors' names from the parties." *United States v. Harris*, 763 F.3d 881 (7th Cir. 2014). In *Harris*, the court found that a jury was not anonymous where (1) the district court did not tell the jury their names were being withheld from the parties; (2) the court explicitly named one juror on the record; and (3) the jury appeared comfortable revealing personal information about themselves during voir dire.

Here, (1) the jurors were addressed by name throughout the first day of voir dire, with the judge only beginning to refer to them by number on the second day; (2) the district court provided counsel with a list containing the name, badge number, and city of residence of each prospective juror, providing them with sufficient information to conduct voir dire; (3) the judge referred to a juror by name after implementing the number-only system; and (4) prospective jurors felt comfortable revealing identifying information such as their employers, job descriptions, and neighborhoods in open court. We therefore find that the jury in this case was not anonymous, and defendants' claims fail.

V. JUROR MISCONDUCT

On November 30, 2006—after the jury had reached a verdict, but before all defendants had been sentenced—defendants R. Yepiz and Contreras moved for a new trial on the basis of juror misconduct, attaching declarations purporting to show that jurors saw VBS graffiti on their train ride to the courthouse. The district court took all admissible portions of the declaration as true for purposes of ruling on the motion for a new trial and denied it. We review the district court's denial of a motion for a new trial based on juror misconduct for abuse of discretion. *United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007). We affirm the district court's ruling because the alleged extrinsic evidence was entirely cumulative of evidence

presented at trial, and evidence of VBS graffiti played a minor part in the government's case.

VI. GRIFFIN ERROR

Defendants contend that a portion of the government's remarks during rebuttal impermissibly drew attention to defendants' failure to testify, in violation of *Griffin v. California*, 380 U.S. 609 (1965). Both parties agree that this Court must review this claim for plain error in light of defendants' failure to object at trial. *See United States v. Kennedy*, 714 F.2d 968, 976–77 (9th Cir. 1983). Read in context, the prosecutor's comments were directed at defense counsel, not defendants, and therefore did not violate *Griffin*. *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1132 (9th Cir. 2005).

VII. PROSECUTORIAL MISCONDUCT

Defendants contend that the government engaged in prosecutorial misconduct when it told the jurors that it was their job to convict defendants. Defendants failed to raise an objection to the government's comments at trial; accordingly, we review for plain error. *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000). Read in context, the government was "arguing that, *if* the jury finds that the prosecution has met its burden of proving the elements beyond a reasonable doubt, *then* it is the jury's duty to convict. Understood in that way, the

prosecutor's statement is clearly proper." *United States v. Gomez*, 725 F.3d 1121, 1131 (9th Cir. 2013) (emphasis in original). This district court did not plainly err.

VIII. ADMISSION OF EVIDENCE

Defendants contend that the district court erred by admitting certain evidence under Federal Rule of Evidence 403, and by reading a summary of the indictment. A district court's rulings pursuant to Rule 403 is given "considerable deference," *United States v. Cordoba*, 194 F.3d 1053, 1063 (9th Cir. 1999), and is reversed for abuse of discretion only if such "nonconstitutional error more likely than not affected the verdict." *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000). Among the litany of evidentiary objections advanced by defendants, many were never raised below and should therefore be reviewed for plain error. However, we need not engage in a plain error analysis because defendants have failed to show that the district court abused its discretion as to any of the contested evidence. *See Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004); *United States v. Matera*, 489 F.3d 115,121 (2d Cir. 2007); *United States v. Fernandez*, 388 F.3d 1214, 1224 (9th Cir. 2004); *United States v. Rodriguez*, 766 F.3d 970, 986–87 (9th Cir. 2014); *United States v. Ganoe*, 538 F.3d 1117, 1124 (9th Cir. 2008); *Hankey*, 203 F.3d at 1173. Furthermore, the district court did not err by reading a summary of the indictment. *United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974).

IX. SEALED DOCUMENTS

Defendants argue that the district court's orders sealing numerous documents violated their right to a public trial under the Sixth Amendment. This claim was never raised below and we therefore review for plain error.

Defendants have failed to cite even a single case holding that the sealing of documents violated a defendant's Sixth Amendment right to a public trial. Defendants' failure show that the error was "clear on its face under current law" is fatal under plain error review. *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000). Moreover, we have previously rejected claims that seek to constitutionalize mere disagreement with a district court's sealing orders. *See United States v. Graf*, 610 F.3d 1148, 1168 (9th Cir. 2010) (citing *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003)).

X. R. YEPIZ'S REQUESTS FOR SUBSTITUTION OF COUNSEL

R. Yepiz argues that the district court violated his Sixth Amendment right to counsel by denying his pre-trial requests for substitution of counsel and a continuance of the trial, that the denials constitute structural error, and that he is therefore entitled to reversal of his conviction. We review denials of motions for substitution and continuance for abuse of discretion. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010); *United States v. Nguyen*, 262 F.3d 998,

1002 (9th Cir. 2001).

District courts are granted "wide latitude" in balancing a defendant's right to counsel of choice with the need for fairness and the demands of their calendars. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). Thus, when a defendant seeks to substitute counsel, the defendant may generally do so "for any reason or no reason" so long as "the substitution would [not] cause significant delay or inefficiency or run afoul of . . . other considerations," such as the "fair, efficient and orderly administration of justice." *Miller v. Blacketter*, 525 F.3d 890, 896 (9th Cir. 2008); *see also Rivera-Corona*, 618 F.3d at 979–80, 1115. "Broad discretion" must also "be granted [to] trial courts on matters of continuances." *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983).

We find that the district court did not abuse its discretion when it denied R. Yepiz's eve-of-trial requests for substitution of counsel and a continuance, given that granting the requests would have substantially burdened the court. *Gonzalez-Lopez*, 548 U.S. at 152. The court quickly inquired into R. Yepiz's requests for substitution, and stated that it would not object to a substitution so long as R. Yepiz's new attorney would be prepared to move forward with trial on August 8, 2006. The court only denied R. Yepiz's requests after learning that his new attorney would not be ready to proceed by that date and would instead require a

continuance. The court then reasonably determined that a continuance would substantially burden its proceedings after considering, among other concerns, (1) the numerous other parties joined in the suit, (2) that the trial date had been set for more than a year; (3) numerous other cases had been continued to make room for this trial, which was expected to last three months; and (4) more than 11,000 jury summonses had already been sent out. The district court's decision to deny R. Yepiz's requests was thus well within its "wide latitude."

XI. R. YEPIZ'S MOTION TO SUPPRESS WIRETAP EVIDENCE

R. Yepiz argues that the district court erred in denying his motion to suppress evidence obtained through wiretaps based on an alleged lack of necessity, 18 U.S.C. §§ 2518(1)(c), and by denying his requests for a *Franks* hearing and *in camera ex parte* review. A district court's decision to deny a *Franks* hearing is reviewed de novo, while underlying factual findings relating to materiality are reviewed for clear error. *United States v. Ippolito*, 774 F.2d 1482, 1484 (9th Cir. 1985). We review the issuing court's finding of necessity for abuse of discretion. *United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002). We review a district court's denial of a motion for an *in camera ex parte* hearing to examine a confidential informant for abuse of discretion. *United States v. Vorasane*, 583 F.

App'x 709, 710-11 (9th Cir. 2014) (unpublished) (citing *United States v. Napier*, 436 F.3d 1133, 1136 (9th Cir. 2006)).

R. Yepiz was not entitled to a *Franks* hearing because he failed to "make a substantial preliminary showing that the affidavit contain[ed] intentionally or recklessly false statements, and . . . [that] the affidavit purged of its falsities would not be sufficient to support a finding of probable cause." *United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995) (internal quotations omitted). The district court did not abuse its discretion in finding necessity. *See United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977); *United States v. Bennett*, 219 F.3d 1117, 1122 (9th Cir. 2000) (quoting *United States v. Torres*, 908 F.2d 1417, 1422 (9th Cir. 1990)). Finally, the district court did not abuse its discretion in denying R. Yepiz's request for *ex parte in camera* review because R. Yepiz failed to overcome the presumption of validity and there was sufficient evidence to establish probable cause even absent evidence gathered from the confidential informant. *See Roviaro v. United States*, 353 U.S. 53, 61 (1957); *United States v. Kiser*, 716 F.2d 1268, 1273 (9th Cir. 1983).

XII. CHALLENGES TO SUFFICIENCY OF EVIDENCE

Various defendants challenge the sufficiency of the evidence supporting their convictions. In addressing their arguments, the court must construe the

evidence "'in the light most favorable to the prosecution,' and only then determine whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). Therefore, we reverse only when "all rational fact finders would have to conclude that the evidence of guilt" was insufficient. *Nevils*, 598 F.3d at 1165. This Court reviews the district court's denial of defendants' motions for acquittal de novo. *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

The government introduced evidence that VBS exhibited hierarchy, role differentiation, a chain of command, membership dues, rules and regulations, internal disciplinary mechanisms, and an enterprise name. This is sufficient to show that VBS is an association-in-fact enterprise. 18 U.S.C.§ 1961(4); *see Boyle v. United States*, 556 U.S. 938, 948 (2009); *United States v. Fernandez*, 388 F.3d 1199, 1224 (9th Cir. 2004).

The government introduced sufficient evidence to show that the nineteen charged racketeering acts were sufficiently related to constitute "a pattern of racketeering activity." 18 U.S.C. § 1961(5); *H.J. Inc. v. N.W. Bell Tel. Co.*, 492

U.S. 229, 239 (1989); *Sun Savs. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987).

i. Carrasco

Carrasco challenges the sufficiency of the evidence supporting his substantive RICO conviction (Count 1), and his convictions for RICO and drug conspiracy (Counts 2 and 3, respectively). The government introduced evidence showing that Carrasco was a bona fide member of VBS, had VBS-related tattoos inscribed across his stomach and behind his ears, and owned a car sporting a VBS-related license plate. Carrasco was also actively involved in drug-dealing with other VBS members, and engaged in gang-banging activities with them. Most notably, he and other gang members helped a wounded VBS member—David Garcia—escape apprehension after a shootout during which he murdered a police officer. Taken together, these facts support the conclusion that Carrasco played at least "some part in directing" VBS affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). This evidence is also sufficient to show continuous and sustained involvement in a range of VBS-related activities from which a reasonable jury could draw the conclusion that Carrasco's understanding with fellow VBS members "was of sufficient scope to warrant the conclusion that he embraced the

common purpose of the conspiracy." *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984).

Finally, Carrasco challenges the sufficiency of his conviction for accessory after the fact (Count 63). Carrasco challenges only the third element of the offense: that he assisted Garcia in "avoiding apprehension, trial or punishment." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1206 (9th Cir. 1991); *see also* 18 U.S.C. § 3. Carrasco's argument can be reduced to the contention that he was merely along for the ride, and did not actively intend to assist Garcia. However, this argument fails to meet the high bar of showing that no reasonable jury could have inferred from the evidence that he was an active participant in helping Garcia abscond.

ii. S. Mejia

S. Mejia challenges his drug conspiracy convictions (Count 3). The government introduced evidence that S. Mejia communicated to Joe Rangel that he was going to start converting cocaine to cocaine base in the same manner as his brother, J. Mejia, and asked Rangel for cocaine to convert. Pay-owe sheets showed that Rangel and S. Mejia trafficked large quantities of cocaine. The government showed that on November 5, 2004, Rangel gave S. Mejia half a kilogram of cocaine. The government also introduced evidence that other VBS members were

aware of S. Mejia's drug trafficking activities. This evidence is sufficient to support S. Mejia's drug conspiracy convictions. *United States v. Mesa-Farias*, 53 F.3d 258, 260 (9th Cir. 1995).

S. Mejia also challenges the jury's quantity findings. A defendant may be held liable for the drugs he personally possessed, in addition to "the quantity of drugs that either (1) fell within the scope of the defendant's agreement with his coconspirators or (2) was reasonably foreseeable to the defendant." *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003). Therefore sufficient evidence supported these findings.

iii. Mendez

Mendez argues that there is insufficient evidence to support his substantive RICO conviction (Count 1) because he was not a member of VBS, and never agreed to participate nor played any part in the criminal enterprise. As an initial matter, Mendez's status as a non-member is of no moment. "Associated outsiders who participate in a racketeering enterprise's affairs fall within RICO's strictures." *United States v. Tille*, 729 F.2d 615, 620 (9th Cir. 1984). Moreover, accepting Mendez's argument requires drawing many inferences from the evidence in his favor, which is manifestly improper under *Nevils*, 598 F.3d 1158 (9th Cir. 2010) (en banc).

iv. R. Yepiz

R. Yepiz also challenges the jury's quantity findings. However, the evidence showed that R. Yepiz entered into many multi-pound methamphetamine and cocaine deals with various members of the conspiracy. Evidence also supported the jury's five kilogram of cocaine finding.

XIII. CHALLENGES TO SENTENCES

Various defendants also challenge their sentences. When reviewing sentences, the appellate court should consider whether (1) the district court committed a procedural error, and (2) the sentence was substantively reasonable. *Gall v. United States*, 552 U.S. 38, 51 (2007).

Procedural error occurs where the district court incorrectly calculates the Guidelines range, treats the Guidelines as mandatory, fails to consider the 18 U.S.C. § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence. *Id.* Procedural error is not a ground for re-sentencing where the error was harmless. *United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010). While sentencing decisions are generally reviewed for abuse of discretion, where a defendant failed to object on the grounds of procedural error below, this court reviews for plain error. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010).

Where the district court's decision is procedurally sound, this court reviews the substantive reasonableness of the decision for abuse of discretion in light of the totality of the circumstances. *Gall*, 522 U.S. at 51. If the petitioner's sentence falls within the Guidelines range, the appellate court "may, but is not required to, apply a presumption of reasonableness." *Id.* However, where the sentencing decision is outside the Guidelines range, the court may not apply a presumption of unreasonableness. *Id.* We must also give "due deference" to the district court's decision that the § 3553(a) factors justify a variance from the Guidelines. *Id.* Thus, an abuse of discretion occurs only where the district court has applied the Guidelines in a way that is "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009).

i. Carrasco

Carrasco challenges his sentence on several grounds. First, he argues that §§ 11350(a) and 11351 of the California Health and Safety Code are not divisible following *Descamps v. United States*, 133 S. Ct 2276, 2285–86 (2013). We find that because § 11351 criminalizes the possession for sale of "any" of a number of controlled substances that the statute identifies by reference, the statute "effectively

create[s] several different . . . crimes" that can be considered in the alternative. *Coronado v. Holder*, 759 F.3d 977, 984 (9th Cir. 2014) (internal quotation marks omitted). It is therefore divisible and subject to the modified **categorical approach. Because "the government only need[ed] to prove one of** the prior convictions to get the enhanced penalty in this case," Carrasco's § 11351 conviction alone was sufficient to support his sentence, and we need not consider whether §§ 11350(a) is also divisible.

Second, Carrasco argues that the district court committed procedural error by improperly calculating his Guidelines range. Because Carrasco failed to offer any support for this allegation and made no attempt to prove that his argument satisfies the elements of plain error, it fails.

Third, Carrasco argues that his offense level for Count 63 should have been 20 rather than 30 because his conduct was "limited to harboring a fugitive." Where a defendant's actions are limited in such a way, the Guidelines restrict the court from imposing an offense level higher than 20. *See* U.S.S.G. § 2X3.1(a)(3)(A)(B) and (C). However, the district court found that Carrasco's actions exceeded merely harboring a fugitive when he (1) picked up and dropped of David Garcia after he murdered Officer Pavelka so that he could make his way to Mexico; (2) toasted Officer Pavelka's death; and (3) was tasked with

investigating police officers' actions at the crime scene that evening, which the court determined was "important" in ensuring Garcia escaped apprehension. The court therefore did not abuse its discretion in refusing to cap his offense level at 20.

Fourth, Carrasco argues that the district court erred by rejecting his request for a minor role reduction and "substantially overstat[ing] the seriousness of his past convictions." In order to qualify for a minor role reduction, Carrasco must have "demonstrate[d] . . . that he was a minimal or minor participant in the criminal activity," to the extent that he was "substantially less culpable" than his co-participants. *United States v. Rosas*, 615 F.3d 1058, 1067 (9th Cir. 2010); *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006).

Carrasco's presentence report, which was adopted by the court, found that while his role in VBS's drug trafficking was "limited to receiving and distributing drugs . . . Carrasco was an average participant in the conspiracy," who "played a mutually supportive role," and was therefore "seen as equal in culpability to the other drug trafficking defendants." The evidence supports such a view, since Carrasco was convicted of possession with the intent to distribute at least 500 grams of cocaine, less than 50 grams of methamphetamine, and less than 100 kilograms of marijuana. In addition, Criminal History departures under USSG § 4A1.3 are "entirely discretionary under the Guidelines," and not subject to

procedural challenge. *United States v. Ellis*, 641 F.3d 411, 421 (9th Cir. 2011). As such, this court may only review them to determine a "sentence's substantive reasonableness," which Carrasco also challenges. *Id*. We find that Carrasco's 180-month sentence followed by eight years of supervised release was not substantively unreasonable, however, because the court reasonably considered Carrasco's history and the § 3553(a) factors in reaching its decision. The court therefore did not err in denying Carrasco's minor role reduction request.

Finally, Carrasco challenges the terms of his supervised release conditions as being impermissibly vague under 18 U.S.C. § 3583. The conditions stipulate that Carrasco may not "associate with" any member of a "criminal street gang," or "disruptive group" and may not wear, display, use, or possess any item that "connotes affiliation" with or membership in VBS. Precedent forecloses three of Carrasco's arguments, as this court has previously held that the terms "associate with," "criminal street gang," and "may connote" are not unconstitutionally vague. *See e.g. United States v. Soltero*, 510 F.3d 858 (9th Cir. 2007). However, as the government concedes, this court has previously found the term "disruptive group" to be impermissibly vague. *See id*. at 867. We must thus **REMAND** to the district court so that it may excise the phrase from Condition 7 of Carrasco's supervised release conditions. *Id*.

ii. Contreras

Contreras contends that his within-Guidelines 300-month sentence is substantively unreasonable. Because his sentence falls within the Guidelines range, we are entitled to apply a presumption of reasonableness. *Gall*, 522 U.S. at 51.

Contreras was convicted of Counts 1-3 of the indictment, based in part on several recorded phone conversations between Contreras and other VBS members with whom he repeatedly discussed exchanging large amounts of methamphetamine and cocaine. Contreras's assertion that the court "obviously doubled" his sentence "simply because of his claimed membership in VBS, though he clearly had no role in the organization and had nothing to do with the matters with which he was charged in the indictment," therefore ignores the evidence in the record, the jury's verdict, and the court's findings. His sentence is not illogical, implausible, or without support.

iii. J. Mejia

J. Mejia contends that the Guidelines "in effect at the time of [his] sentencing were amended during the pendency of [his] appeal." In addition, he contends that due to an intervening change in California State Law 47, J. Mejia's prior narcotics conviction has been reduced from a felony to a misdemeanor. The government concedes that the amendments make J. Mejia "potentially eligible for a

sentence reduction." Its sole objection on appeal is that the correct way to request a sentence adjustment is to "file a motion in the district court, in the first instance, under 18 U.S.C. § 3582(c)(2)," so that the government would be "free to re-advance its original position that J. Mejia conspired to distribute 18 kilograms of cocaine."

While J. Mejia argues that such an action would "penalize" him by affirming a "now erroneous factual finding concerning his criminal history," this court has previously denied similar requests for resentencing without prejudice, so that defendants may move for an adjustment of their sentence in the district court. *See United States v. Ogo*, 298 F. App'x 664 (9th Cir. 2008). We therefore **DENY** J. Mejia's request without prejudice.

iv. *S. Mejia*

S. Mejia challenges the district court's mandatory minimum life sentence on the basis that the government failed to prove drug quantities. However, the district court's sentence was required under 21 U.S.C. §§ 841 (2006), given the jury's cocaine base and methamphetamine findings and Sergio's prior felony drug offenses.

v. *Mendez*

Mendez argues that his 210-month sentence is substantively unreasonable because the district court denied him a minor role reduction under U.S.S.G. § 3B1.2, and is unreasonably high. In order to qualify for a mitigating role reduction, a defendant must "demonstrate by a preponderance of the evidence that he was a minimal or minor participant in the criminal activity," and "substantially less culpable" than his co-participants. *United States v. Rosas*, 615 F.3d 1058, 1067 (9th Cir. 2010); *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006).

The jury found Mendez guilty of Counts 1-3, 35, 36, and Racketeering Acts 1, 40(a), and 40(b), which included the distribution of large quantities of cocaine and marijuana. Based on this evidence, it was not erroneous for the court to conclude that Mendez "helped play an important role" in VBS's drug trafficking activities."

Mendez's sentence was also not unreasonably high. Based on the drug quantities found by the jury, the district court appropriately applied an offense base level of 36. The resulting Guidelines range, given a Criminal History Category of III, was 235-293 months. The court considered the § 3553(a) factors, highlighting that Mendez was a successful musician whose prior convictions were minor and unrelated to drugs, and accordingly gave him a sentence below the Guidelines

range. *Id*. at 60-61. Mendez's sentence is not illogical, implausible, or without support.

vi. Meza

Meza contends that his sentence violated his due process rights because the district court relied on the allegedly erroneous fact that Meza was a member of VBS. A defendant's due process rights are violated during sentencing where a court relies on "materially false or unreliable information." *United States v. Columbus*, 881 F.2d 785, 787 (9th Cir. 1989). To rebut his sentence, Meza needed to show that his classification as a VBS member was (1) false or unreliable, and (2) the basis for his sentence. *Id.* Meza can show neither.

First, ample evidence—including VBS graffiti in Meza's rental home and his extensive knowledge of VBS affairs—chronicled Meza's involvement in the VBS, making the conclusion that he is a VBS member neither false nor unreliable. Second, the district court clearly stated that while it was sure Meza was a gang member, it was "looking at Mr. Meza's drug trafficking activities as the primary force in the sentence" it chose to impose. Meza's gang membership was therefore not the basis for his sentence and his claim fails.

vii. M. Yepiz

M. Yepiz challenges his within-Guidelines 240-month sentence as substantively unreasonable. However, we need not consider this argument because we reversed his conviction in our concurrently filed opinion.

viii. R. Yepiz

R. Yepiz challenges his mandatory life sentence, arguing that his two prior convictions under California Health and Safety Code § 11351 do not qualify as "felony drug offenses" for purposes of 21 U.S.C. §§ 841 and 851. Because R. Yepiz failed to raise this argument below, we review for plain error.

As discussed above in § XIII.i, we find that § 11351 is divisible and subject to the modified categorical approach. The sentencing court therefore did not plainly err when it used the modified categorical approach to determine "which element [of § 11351] formed the predicate offense for [R. Yepiz's] conviction." *Coronado*, 759 F.3d at 985.

The sentencing court also did not plainly err in determining that documents submitted to the district court were sufficient to demonstrate that R. Yepiz's 1993 conviction was a "felony drug offense." The government submitted three documents, including (1) a certified felony complaint in **case BA066066** charging R. Yepiz in Count 7 with "possess[ion] for sale and purchase for sale a controlled substance, to wit, cocaine;" (2) certified minutes from **case BA066066** showing

that R. Yepiz withdrew a plea of "not guilty" and pled nolo contendere to "a violation of Section 11351 H&S in Count 07;" and (3) a certified Disposition of Arrest and Court action form in **case BA066066** that, although partly illegible, shows R. Yepiz was charged under Count 7 with a violation of § 11351 and sentenced to two years imprisonment. This circuit has previously held that documents similar to those provided here were sufficient to establish a predicate offense for purposes of the modified categorical approach. *See e.g. United States v. Strickland*, 601 F.3d 963, 970 (9th Cir. 2010) (en banc). The submitted documents were therefore sufficient to establish R. Yepiz's predicate offense under § 11351 as possession of a narcotic or controlled substance for sale, which falls squarely within the definition of "felony drug offense" under § 841. *See* 21 U.S.C. § 841.

ix. Zambrano

Zambrano raises a procedural challenge to his sentence, arguing that the district court violated Federal Rule of Criminal Procedure 32(h) by failing to notify him of its intent to "depart" from the Guidelines range in imposing a 480-month sentence.

Rule 32(h) requires a district court to notify the parties before it may "depart from the applicable sentencing range on a ground not identified for departure either

in the presentence report or in a party's prehearing submission." Fed. R. Crim. P. 32(h). However, as noted by the Supreme Court in *Irizarry v. United States*, 553 U.S. 708 (2008), Rule 32(h) applies only to "departures," not "variances." *Id*. at 714. A "departure" refers to a "change from the final sentencing range computed by examining the provisions of the Guidelines themselves," while a "variance" refers to a sentence falling "above or below the properly calculated final sentencing range based on the application of statutory factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Moschella*, 727 F.3d 888, 893 (9th Cir. 2013).

Here, the district court determined Zambrano's Guidelines range to be 235 to 293 months. After lengthy consideration of the § 3553(a) factors, the court found that that range "fail[ed] to adequately capture . . . [Zambrano's] criminal conduct and history," and chose to impose a sentence of 480 months. Throughout the court's discussion, it did not state that it wished to "depart" from the Guidelines range, but instead that it wished to impose a higher sentence in light of the § 3553(a) factors. The court thus applied a variance rather than a departure and Rule 32(h) does not apply.

XIV. CUMULATIVE ERROR

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors

may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). However, here, we have largely found that the district court did not err. Furthermore, the cumulative effect of the instances where we have found that error was either harmless or did not rise to the level of plain error do not require reversal because "it is more probable than not that, taken together, they did not materially affect the verdict." *United States v. Fernandez*, 388 F.3d 1199, 1257 (9th Cir. 2004).

We conclude that all other issues are without merit.

XV. CONCLUSION

We **REMAND** to allow the district court to amend Carrasco's conditions of supervised release; we **DENY** J. Mejia's request for a sentencing reduction without prejudice to filing a motion in the district court; we **AFFIRM** as to all other issues addressed in this memorandum disposition.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MANUEL YEPIZ, AKA Martin Sanchez, "Seal G," and "Pony," *Defendant-Appellant.*	No. 07-50051 D.C. No. CR-05-00578-JFW-7

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOSE LUIS MEJIA, AKA Jose Luiz Mejia, Jose Nernedes, Juan Martinez, Jose Mejia, Check Mejia, Jose Al Mejia, Joe Morin, Jose L. Mejia, "Checho," "Joe," and "Cheech," *Defendant-Appellant.*	No. 07-50062 D.C. No. CR-05-00578-JFW-37

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. FRANCISCO ZAMBRANO, AKA "Franky Boy" and "Franky," *Defendant-Appellant.*	No. 07-50063 D.C. No. CR-05-00578-JFW-35
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JESUS CONTRERAS, AKA Jessie Contreras, and "Yuck," *Defendant-Appellant.*	No. 07-50067 D.C. No. CR-05-00578-JFW-21
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MARIANO MEZA, *Defendant-Appellant.*	No. 07-50070 D.C. No. CR-05-00578-JFW-44

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SERGIO MEJIA, AKA Robert Mesa, "Seal JJ," and "Jaws," *Defendant-Appellant.*	No. 07-50098 D.C. No. CR-05-00578-JFW-36

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GILBERTO CARRASCO, AKA Gilberto Carrasco, Jr., Gil Carrasco, Robert Carrasco, Gilberto Carrosco, Gilberto Corrosco, Julio Gonazalez, Vicente Hernandez, Vincente Hernandez, Vincente NMN Hernandez, Sergio Renteria, Juan Rosas, "Beto," "Betillo," "Red," and "Cejas," *Defendant-Appellant.*	No. 07-50133 D.C. No. CR-05-00578-JFW-22

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ERNESTO OROZCO MENDEZ, AKA "Gordo," "El Gordo," Ernesto Mijares, Ernesto Mendoza Mijares, Ernesto Mendoza Orozco (Birth Name), *Defendant-Appellant.*	No. 07-50142 D.C. No. CR-05-00578-JFW-31
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. RAFAEL YEPIZ, *Defendant-Appellant.*	No. 07-50264 D.C. No. CR-05-00578-JFW-1 ORDER

Filed November 20, 2017

Before: Stephen Reinhardt, M. Margaret McKeown,* and Jacqueline H. Nguyen, Circuit Judges.

* Judge McKeown was drawn to replace Judge Noonan on the panel following his death. Judge McKeown has read the briefs, reviewed the record, and listened to the oral argument.

ORDER

The opinion and partial dissent filed December 20, 2016, and appearing at 844 F.3d 1070 (9th Cir. 2016), are withdrawn. The opinion may not be cited as precedent by or to this court or any district court of the Ninth Circuit. A concurrently issued amended memorandum disposition addresses all of the issues before the court.

Pursuant to the court's May 31, 2017 order (No. 07-50051, Docket Entry No. 352), the following motions, submitted pro se by appellant Jose Luis Mejia, will not be considered: his April 10 and May 22, 2017 motions to join in other appellants' petitions for rehearing and petitions for rehearing en banc (No. 07-50051, Docket Entry Nos. 333, 348); his April 24, 2017 motion for leave to supplement his petition for rehearing and petition for rehearing en banc (No. 07-50051, Docket Entry No. 345), his May 24, 2017 motion to terminate hearing with the Appellate Commissioner (No. 07-50051, Docket Entry No. 350), and his June 30, 2017 motion for reconsideration (No. 07-50051, Docket Entry No. 353).

The panel has voted to deny the petitions for panel rehearing and to deny the petitions for rehearing en banc. The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for panel rehearing and the petitions for rehearing en banc are denied.

APPENDIX D

NOT FOR PUBLICATION

FILED

NOV 20 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL YEPIZ, AKA Martin Sanchez, "Seal G," and "Pony," Defendant-Appellant.	No. 07-50051 D.C. No. CR-05-00578-JFW-7 AMENDED MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS MEJIA, AKA Jose Luiz Mejia, Jose Nernedes, Juan Martinez, Jose Mejia, Check Mejia, Jose Al Mejia, Joe Morin, Jose L. Mejia, "Checho," "Joe," and "Cheech," Defendant-Appellant.	No. 07-50062 D.C. No. CR-05-00578-JFW-37

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 07-50063 D.C. No. CR-05-00578-JFW-35

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

v.

FRANCISCO ZAMBRANO, AKA "Franky Boy" and "Franky,"

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS CONTRERAS, AKA Jessie Contreras and "Yuck,"

Defendant-Appellant.

No. 07-50067

D.C. No. CR-05-00578-JFW-21

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARIANO MEZA,

Defendant-Appellant.

No. 07-50070

D.C. No. CR-05-00578-JFW-44

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SERGIO MEJIA, AKA Robert Mesa, "Seal JJ," and "Jaws,"

No. 07-50098

D.C. No. CR-05-00578-JFW-36

Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GILBERTO CARRASCO, AKA Gilberto Carrasco, Jr., Gil Carrasco, Robert Carrasco, Gilberto Carrosco, Gilberto Corrosco, Julio Gonazalez, Vicente Hernandez, Vincente Hernandez, Vincente Nmn Hernandez, Sergio Renteria, Juan Rosas, "Beto," "Betillo," "Red," and "Cejas," Defendant-Appellant.	No. 07-50133 D.C. No. CR-05-00578-JFW-22

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERNESTO OROZCO MENDEZ, AKA "Gordo," "El Gordo," Ernesto Mijares, Ernesto Mendoza Mijares, Ernesto Mendoza Orozco (Birth Name), Defendant-Appellant.	No. 07-50142 D.C. No. CR-05-00578-JFW-31

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 07-50264 D.C. No. CR-05-00578-JFW-1

v.

RAFAEL YEPIZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 7, 2015
Pasadena, California

Before: REINHARDT, McKEOWN,[**] and NGUYEN, Circuit Judges.

Appellants—Manuel Yepiz, Jose Luis Mejia, Francisco Zambrano, Jesus Contreras, Mariano Meza, Sergio Mejia, Gilberto Carrasco, Rafael Yepiz, and Ernesto Mendez—are all alleged members of the Vineland Boys gang ("VBS") and timely appealed their convictions and sentences. The court has concurrently withdrawn its December 20, 2016 opinion addressing appellants' joint *Brady* claims and Manuel Yepiz's Sixth Amendment Right to Counsel claim. This amended memorandum disposition addresses all of the issues before the court.

I. Voir Dire

Defendants contend that the district court's voir dire procedures violated their right to be present at trial and their right to a public trial. "Although we

[**] Judge McKeown was drawn to replace Judge Noonan on the panel following his death. Judge McKeown has read the briefs, reviewed the record, and listened to the oral argument.

review the district court's conduct of voir dire for abuse of discretion, questions of law that arise during the course of voir dire are reviewed de novo." *United States v. Reyes*, 764 F.3d 1184, 1188 (9th Cir. 2014) (internal citation omitted).

The voir dire procedures fashioned by the district court did not violate defendants' constitutional right to be present, which must at times yield to the "day-to-day realities of courtroom life," as well as "society's interest in the administration of criminal justice." *Rushen v. Spain*, 464 U.S. 114, 119 (1983) (per curiam). In this case, the district court provided defendants as much ability to observe prospective jurors and participate in the voir dire process as possible in light of the countervailing considerations of security, juror privacy, and courtroom logistics. We therefore cannot say that "a fair and just hearing [was] thwarted by" defendants' absence from certain portions of voir dire. *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934); *cf. Rice v. Wood*, 77 F.3d 1138, 1145 (9th Cir. 1996) (en banc); *Reyes*, 764 F.3d at 1190.

Even assuming that the voir dire procedures violated defendants' statutory right to be present under Federal Rule of Criminal Procedure 43, any error was harmless because "there is no reasonable possibility that prejudice resulted from the [defendants'] absence." *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002) (quoting *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986)); *see also United States v. Bordallo*, 857 F.2d 519, 523 (9th Cir. 1988).

Because defendants never argued below that the voir dire procedures violated their right to a public trial, this claim is forfeited on appeal. *Freytag v. Comm'r*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring); *United States v. Cazares*, 788 F.3d 956, 971 (9th Cir. 2015). Defendants cite no case holding that similar voir dire procedures violate the right to a public trial. Their failure to show that the error was "clear on its face under current law" is fatal under plain error review. *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000).

II. Pretrial Publicity

At the close of trial, the district court denied defendants' motion for a mistrial based in part on juror exposure to pretrial publicity. Defendants claimed that an article published by the *Daily News* entitled "Vineland Boys About to Face Judgment Days" violated their Sixth Amendment right to a trial by an impartial jury. A trial court's finding of impartiality may be overturned only for manifest error. *Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991). "[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). The exposure to pretrial publicity in this case bears little resemblance to the extreme cases that have given rise to a violation of the right to an impartial jury. *Compare Skilling v. United States*, 561 U.S. 358 (2010), *with Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Accordingly, we find that the publicity in this case does not implicate the Sixth Amendment.

III. *Batson* Error

During voir dire on August 22, 2006, the government exercised a peremptory challenge against Juror number 6, a Hispanic male. Defendants objected, arguing that the government sought to exclude the juror on the basis of his race. The district court conducted a *Batson* analysis and concluded that the government's reasons constituted a credible, race-neutral basis for striking Juror 6, and accordingly overruled the objection. Defendants now contend that the district court erred. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

Defendants argue that the district court's failure to engage in a comparative analysis on the record amounts to procedural error that is per se reversible. *See generally Ali v. Hickman*, 584 F.3d 1174, 1184 (9th Cir. 2009). However, this court has recently rejected this precise argument. *Murray v. Schriro* 745 F.3d 984, 1005 (9th Cir. 2014).

Defendants further argue that in rejecting their *Batson* objection to Juror 6, the district court improperly considered the fact that defendants would have the opportunity to have other Hispanic individuals on the jury because three of the next nine potential jurors to be questioned were Hispanic. As an initial matter, defendants cite no case supporting the proposition that this would constitute

reversible error. Moreover, it was defense counsel—not the trial court—that initially commented on the ethnicity of the potential jurors to be questioned. Read in context, the district court's remarks were merely a response to counsel's comment and played no part in its *Batson* analysis.

IV. Anonymous Jury

Contreras and Mendez contend that the district court empaneled an anonymous jury without providing the proper safeguards to protect their constitutional rights to a fundamentally fair trial and their presumption of innocence. Because neither Contreras's nor Mendez's attorneys objected to the empaneling of an anonymous jury below, we review for plain error. *See United States v. Marcus*, 560 U.S. 258, 262 (2010).

While this circuit has never explicitly stated which factors make a jury anonymous, the Seventh Circuit has held that empaneling an anonymous jury "requires withholding, at least, the jurors' names from the parties." *United States v. Harris*, 763 F.3d 881, 885 (7th Cir. 2014). That did not happen here. The jurors were addressed by name throughout the first day of voir dire, counsel were given a list containing the name, badge number, and city of residence of each prospective juror, and prospective jurors discussed identifying information such as their employers, job descriptions, and neighborhoods in open court. We therefore find that the jury in this case was not anonymous.

V. Juror Misconduct

On November 30, 2006—after the jury had reached a verdict, but before all defendants had been sentenced—defendants R. Yepiz and Contreras moved for a new trial on the basis of juror misconduct, attaching declarations purporting to show that jurors saw VBS graffiti on their train ride to the courthouse. The district court took all admissible portions of the declaration as true for purposes of ruling on the motion for a new trial and denied it. We review the district court's denial of a motion for a new trial based on juror misconduct for abuse of discretion. *United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007). We affirm the district court's ruling because the alleged extrinsic evidence was entirely cumulative of evidence presented at trial, and evidence of VBS graffiti played a minor part in the government's case.

VI. *Griffin* Error

Defendants contend that a portion of the government's remarks during rebuttal impermissibly drew attention to defendants' failure to testify, in violation of *Griffin v. California*, 380 U.S. 609 (1965). We review this claim for plain error in light of defendants' failure to object at trial. *See United States v. Kennedy*, 714 F.2d 968, 976–77 (9th Cir. 1983). Read in context, the prosecutor's comments were directed at defense counsel, not defendants, and therefore did not violate

Griffin. *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1132 (9th Cir. 2005).

VII. Prosecutorial Misconduct

Defendants contend that the government engaged in prosecutorial misconduct when it told the jurors that it was their job to convict defendants. Defendants failed to raise an objection to the government's comments at trial; accordingly, we review for plain error. *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000). Read in context, the government was "arguing that, *if* the jury finds that the prosecution has met its burden of proving the elements beyond a reasonable doubt, *then* it is the jury's duty to convict. Understood in that way, the prosecutor's statement is clearly proper." *United States v. Gomez*, 725 F.3d 1121, 1131 (9th Cir. 2013).

VIII. Admission of Evidence

Defendants contend that the district court erred by admitting certain evidence under Federal Rule of Evidence 403 and by reading a summary of the indictment. A district court's rulings pursuant to Rule 403 are given "considerable deference," *United States v. Cordoba*, 194 F.3d 1053, 1063 (9th Cir. 1999) (quoting *United States v. Layton*, 855 F.2d 1388, 1402 (9th Cir. 1988)), and are "reversed for abuse of discretion only if such nonconstitutional error more likely than not affected the verdict." *United States v. Hankey*, 203 F.3d 1160, 1167 (9th

Cir. 2000) (quoting *United States v. Ramirez*, 176 F.3d 1179, 1182 (9th Cir. 1999)).

Among the litany of evidentiary objections advanced by defendants, many were not raised below and should therefore be reviewed for plain error. Even under abuse of discretion review, however, the district court did not err in admitting any of the contested evidence. *See Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004); *United States v. Fernandez*, 388 F.3d 1199, 1224 (9th Cir. 2004); *United States v. Rodriguez*, 766 F.3d 970, 986–87 (9th Cir. 2014); *United States v. Ganoe*, 538 F.3d 1117, 1124 (9th Cir. 2008); *Hankey*, 203 F.3d at 1173. Furthermore, the district court did not err by reading a summary of the indictment. *See United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974).

IX. Sealed Documents

Defendants argue that the district court's orders sealing numerous documents violated their right to a public trial under the Sixth Amendment. This claim was never raised below and we therefore review for plain error.

Defendants failed to cite any case supporting their claim. The failure to show that the error was "clear on its face under current law" is fatal under plain error review. *Campos*, 217 F.3d at 712. Moreover, we have previously rejected claims that seek to constitutionalize mere disagreement with a district court's

sealing orders. *See United States v. Graf*, 610 F.3d 1148, 1168 (9th Cir. 2010) (citing *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003)).

X. *Brady* Error

Defendants argue that the government violated *Brady* by failing to disclose the full extent of the benefits that the government's cooperating witness Victor Bulgarian received at trial. We review alleged *Brady* violations de novo. *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017).

The government first argues that defendants waived their *Brady* claim by failing to raise it in the district court. However, the new evidence was not revealed until after expiration of the three-year limit to file a motion for new trial. *See* Fed. R. Crim. P. 33(b)(1). When the new evidence came to light, this appeal had been pending for more than two years. "It defies logic to suggest that [defendants] waived a claim by not raising it before a court that lacked jurisdiction to consider it." *United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995).

Next, the government presents a litany of impeachment evidence that it produced to defendants, and argues that "additional payments information could hardly have caused the jury to view Bulgarian or his relationship with the government differently or with greater caution." However, "the government cannot satisfy its *Brady* obligation to disclose exculpatory evidence by making

some evidence available and claiming the rest would be cumulative." *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997).

Moreover, the undisclosed evidence—that Bulgarian made hundreds of thousands of dollars assisting law enforcement and enjoyed a relationship that allowed him to earn benefits whenever he chose—was material. While some of Bulgarian's testimony was independently corroborated, it nonetheless played a substantial role in the government's case-in-chief. In particular, the government relied heavily upon Bulgarian's testimony to show that VBS was a "criminal enterprise" under RICO. Despite the effect of other impeachment evidence provided by the government, evidence that Bulgarian received substantially more than the $5,000 disclosed on cross examination could very well have resulted in the jury disbelieving all of his testimony. *Cf. Benn v. Lambert*, 283 F.3d 1040, 1058 (9th Cir. 2002). Thus, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Finally, the government argues that the record conclusively shows that Bulgarian earned the benefits at issue after defendants' trial. The government points to a discovery letter sent to Horacio Yepiz in August 2009, informing him that Bulgarian had received an additional $80,000 to $90,000 from the government after his 2006 testimony in this case. However, Bulgarian testified that he may

have received as much as $200,000 between 2004 and 2009; therefore, a letter stating that he received roughly half that sum after defendants' trial does not foreclose their *Brady* claim.

The government concedes that the facts surrounding benefits paid to Bulgarian are "in dispute." Likewise, defendants admit that "there are fact-finding gaps in the record with regard to how much Bulgarian was paid, when he received payments, and the purpose of the payments." Defendants request that we bridge these gaps by taking judicial notice of Bulgarian's 2009 testimony at Horacio Yepiz's trial. Because we may take judicial notice only of facts "not subject to reasonable dispute," we **DENY** defendants' motion. Fed. R. Evid. 201; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). We also **DENY** defendants' motion to take judicial notice of a complaint, verdict, and judgment in a state civil negligence case, because defendants do not adequately explain how these documents relate to any of their arguments on appeal or how they meet the standard for judicial notice.

At oral argument, the government conceded that defendants should have an opportunity to litigate their *Brady* claims by collaterally attacking their conviction under 28 U.S.C. § 2255. However, the government points to no opinion of this court holding that a postconviction motion under § 2255 is preferable to a remand. Indeed, the government stated at oral argument that "it doesn't make much

difference" what mechanism is used. Moreover, defendants would not enjoy the benefit of counsel in a § 2255 proceeding. Given that counsel for defendants are already familiar with the facts surrounding the *Brady* issue, the interests of justice and judicial efficiency militate in favor of remanding to the district court.

In light of the disputed facts surrounding defendants' *Brady* claim, we **REMAND** to the district court so that it may engage in the necessary factfinding to ascertain whether Bulgarian received benefits that were undisclosed to defendants at the time of trial, and if so, whether *Brady* was violated as to each convicted count.

XI. Requests for Substitution of Counsel

R. Yepiz and M. Yepiz argue that the district court violated their Sixth Amendment right to counsel by denying their pretrial requests for substitution of counsel and a continuance of the trial, that the denials constitute structural error, and that they are therefore entitled to reversal of their convictions. We review denials of motions for substitution of counsel and continuance of trial for abuse of discretion. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010); *United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001).

District courts require "wide latitude" in balancing a defendant's right to counsel of choice with the need for fairness and the demands of their calendars. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). Thus, when a

defendant seeks to substitute counsel, the defendant may generally do so "for any reason or no reason" so long as the substitution would not "cause significant delay or inefficiency or run afoul of . . . other considerations," *Rivera-Corona*, 618 F.3d 976, 979–80 (citing *Miller v. Blacketter*, 525 F.3d 890, 896 (9th Cir. 2008)), such as the "fair, efficient and orderly administration of justice," *id.* at 979 (quoting *United States v. Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007)). "[B]road discretion must be granted trial courts on matters of continuances." *Morris v. Slappy*, 461 U.S. 1, 11 (1983).

i. Eve-of- and Mid-Trial Requests

The district court did not abuse its discretion when it denied R. Yepiz's and M. Yepiz's requests for substitution of counsel and a continuance, made on the eve of and mid-trial, given that granting the requests would have substantially burdened the court. *See Gonzalez-Lopez*, 548 U.S. at 152.

The court quickly inquired into the requests for substitution. At the hearing on R. Yepiz's requests, the court stated that it would not object to a substitution so long as his new attorney would be prepared to move forward with trial on August 8, 2006. The court denied R. Yepiz's requests only after learning that his new attorney would not be ready to proceed by that date and would instead require a continuance. The court then reasonably determined that a continuance would substantially burden its proceedings after considering, among other concerns, that

(1) numerous other parties were joined in the suit; (2) the trial date had been set for more than a year; (3) numerous other cases had been continued to make room for this trial, which was expected to last three months; and (4) more than 11,000 jury summonses had already been sent out. The district court's decision to deny R. Yepiz's requests was thus well within its "wide latitude."

Similarly, in denying M. Yepiz's requests for substitution made at the end of July, the court reasonably determined that the attorney-client relationship had not broken down, that substitution "would necessitate a continuance," and that the similarly-timed requests from M. Yepiz and his co-defendants amounted to "nothing more than a strategic attempt to delay the trial." At the hearing on his September 2006 letter, sent on the 23rd day of trial, M. Yepiz clarified that his letter was not a request for substitution but actually "just a request to get the video" of his arrest, and his attorney agreed to produce it.

ii. M. Yepiz's April 2006 Letter

M. Yepiz's April 2006 letter to the court described "financial differences" that had developed between him and his attorney. M. Yepiz did not express concern about his attorney's competence or any other aspect of counsel's performance. He wrote that he "need[ed] a Panel attorney" because his retained counsel had only recently informed him of the representation's "financial cost." The district court rejected the letter for filing due to M. Yepiz's failure to comply

with the local rules prohibiting pro se letters by represented parties. The court returned the letter to counsel, who informed M. Yepiz that his letter had been rejected.

We afford district courts great discretion in enforcing such local rules, *see United States v. Kent*, 649 F.3d 906, 911 (9th Cir. 2011), because "[a] criminal defendant does not have an absolute right to both self-representation and the assistance of counsel." *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981). The court did not abuse its discretion in rejecting M. Yepiz's April 2006 letter. Nothing in the letter put the court on notice that the relationship between Yepiz and his attorney had broken down such that court intervention was necessary to protect his Sixth Amendment rights.

XII. R. Yepiz's Motion to Suppress Wiretap Evidence

R. Yepiz argues that the district court erred in denying his motion to suppress evidence obtained through wiretaps based on an alleged lack of necessity, *see* 18 U.S.C. § 2518(1)(c), and by denying his requests for a *Franks* hearing and in camera ex parte review. A district court's decision to deny a *Franks* hearing is reviewed de novo, while the underlying factual findings relating to materiality are reviewed for clear error. *United States v. Ippolito*, 774 F.2d 1482, 1484 (9th Cir. 1985). We review the issuing court's finding of necessity for abuse of discretion. *United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002). We review a

district court's denial of a motion for an in camera ex parte hearing to examine a confidential informant for abuse of discretion. *See United States v. Fixen*, 780 F.2d 1434, 1440 (9th Cir. 1986).

R. Yepiz was not entitled to a *Franks* hearing because he failed to "make a substantial preliminary showing that 'the affidavit contain[ed] intentionally or recklessly false statements, and . . . [that] the affidavit purged of its falsities would not be sufficient to support a finding of probable cause.'" *United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995) (quoting *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir. 1980)). The district court did not abuse its discretion in finding necessity. *See United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977); *United States v. Bennett*, 219 F.3d 1117, 1122 (9th Cir. 2000). Finally, the district court did not abuse its discretion in denying R. Yepiz's request for ex parte in camera review because he failed to overcome the presumption of validity and there was sufficient evidence to establish probable cause even absent evidence gathered from the confidential informant. *See Roviaro v. United States*, 353 U.S. 53, 61 (1957); *United States v. Kiser*, 716 F.2d 1268, 1273 (9th Cir. 1983).

XIII. Challenges to Sufficiency of Evidence

Various defendants challenge the sufficiency of the evidence supporting their convictions. We must construe the evidence "'in the light most favorable to the prosecution,' and only then determine whether '*any* rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in *Jackson*). Therefore, we reverse only when "all rational fact finders would have to conclude that the evidence of guilt" was insufficient. *Id.* at 1165. We review the district court's denial of defendants' motions for acquittal de novo. *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

The government introduced evidence that VBS exhibited hierarchy, role differentiation, a chain of command, membership dues, rules and regulations, internal disciplinary mechanisms, and an enterprise name. This is sufficient to show that VBS is an association-in-fact enterprise. *See* 18 U.S.C. § 1961(4); *Boyle v. United States*, 556 U.S. 938, 948 (2009); *Fernandez*, 388 F.3d at 1224. There was also sufficient evidence that the nineteen charged racketeering acts were sufficiently related to constitute a "pattern of racketeering activity." 18 U.S.C. § 1961(5); *see H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989); *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987).

i. Carrasco

Carrasco challenges the sufficiency of the evidence supporting his substantive RICO conviction (Count 1), and his convictions for RICO and drug conspiracy (Counts 2 and 3, respectively). The government introduced evidence

showing that Carrasco was a bona fide member of VBS, had VBS-related tattoos inscribed across his stomach and behind his ears, and owned a car sporting a VBS-related license plate. Carrasco was also actively involved in drug dealing and gangbanging activities with other VBS members. Most notably, he and other gang members helped a wounded VBS member—David Garcia—escape apprehension after a shootout during which he murdered a police officer. Taken together, these facts support the conclusion that Carrasco played at least "*some* part in directing" VBS's affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). This evidence is also sufficient to show continuous and sustained involvement in a range of VBS-related activities from which a reasonable jury could draw the conclusion that Carrasco's understanding with fellow VBS members "was of sufficient scope to warrant the conclusion that he embraced the common purpose of the overall conspiracy." *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984).

Finally, Carrasco challenges the sufficiency of his conviction for accessory after the fact (Count 63). Carrasco challenges only the third element of the offense: that he assisted Garcia in "avoiding apprehension, trial or punishment." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1206 (9th Cir. 1991); *see also* 18 U.S.C. § 3. Carrasco's argument can be reduced to the contention that he was merely along for the ride, and did not actively intend to assist Garcia. However, this argument fails to meet the high bar of showing that no reasonable jury could have

inferred from the evidence that he was an active participant in helping Garcia abscond.

ii. S. Mejia

S. Mejia challenges his drug conspiracy convictions (Count 3). The government introduced evidence that S. Mejia communicated to Joe Rangel that he was going to start converting cocaine to cocaine base in the same manner as his brother, J. Mejia, and asked Rangel for cocaine to convert. Pay-owe sheets showed that Rangel and S. Mejia trafficked large quantities of cocaine. The evidence showed that on November 5, 2004, Rangel gave S. Mejia half a kilogram of cocaine. The government also introduced evidence that other VBS members were aware of S. Mejia's drug trafficking activities. This evidence is sufficient to support S. Mejia's drug conspiracy convictions. *See United States v. Mesa-Farias*, 53 F.3d 258, 260 (9th Cir. 1995).

S. Mejia also challenges the jury's quantity findings. A defendant may be held liable for the drugs he personally possessed, in addition to "the quantity of drugs that either (1) fell within the scope of the defendant's agreement with his coconspirators or (2) was reasonably foreseeable to the defendant." *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003). Therefore, sufficient evidence supported these findings.

iii. Mendez

Mendez argues that there is insufficient evidence to support his substantive RICO conviction (Count 1) because he was not a member of VBS and never agreed to participate or played any part in the criminal enterprise. As an initial matter, Mendez's status as a non-member is of no moment. "Associated outsiders who participate in a racketeering enterprise's affairs fall within RICO's strictures." *United States v. Tille*, 729 F.2d 615, 620 (9th Cir. 1984). Moreover, accepting Mendez's argument requires drawing many inferences from the evidence in his favor, which is manifestly improper under *Nevils*.

iv. R. Yepiz

R. Yepiz also challenges the jury's quantity findings. However, the evidence showed that R. Yepiz entered into many multi-pound methamphetamine and cocaine deals with various members of the conspiracy. Evidence also supported the jury's finding of five kilograms of cocaine.

XIV. Challenges to Sentences

Various defendants also challenge their sentences. We consider whether (1) the district court committed a procedural error, and (2) the sentence was substantively reasonable. *Gall v. United States*, 552 U.S. 38, 51 (2007).

Procedural error occurs where the district court incorrectly calculates the Guidelines range, treats the Guidelines as mandatory, fails to consider the 18 U.S.C. § 3553(a) factors, selects a sentence based on clearly erroneous facts, or

fails to adequately explain the chosen sentence. *Id.* Procedural error is not a ground for resentencing where the error was harmless. *United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010). While sentencing decisions are generally reviewed for abuse of discretion, where a defendant fails to object in the district court on the ground of procedural error, we review for plain error. *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010).

If the district court's decision is procedurally sound, we review the substantive reasonableness of the decision for abuse of discretion in light of the totality of the circumstances. *Gall*, 522 U.S. at 51. If the defendant's sentence falls within the Guidelines range, we "may, but [are] not required to, apply a presumption of reasonableness." *Id.* However, we "may not apply a presumption of unreasonableness" if the sentencing decision is outside the Guidelines range. *Id.* We must give "due deference" to the district court's decision that the § 3553(a) factors justify a variance from the Guidelines. *Id.* Thus, an abuse of discretion occurs only where the district court has applied the Guidelines in a way that is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

i. Carrasco

Carrasco challenges his sentence on several grounds. First, he argues that sections 11350(a) and 11351 of the California Health and Safety Code are not divisible following *Descamps v. United States*, 133 S. Ct. 2276, 2285–86 (2013). Because section 11351 criminalizes the possession for sale of "any" of a number of controlled substances that the statute identifies by reference, the statute "effectively create[s] 'several different . . . crimes'" that can be considered in the alternative. *Coronado v. Holder*, 759 F.3d 977, 984 (9th Cir. 2014) (quoting *Descamps*, 133 S. Ct. at 2285). It is therefore divisible and subject to the modified categorical approach. *United States v. Torre-Jimenez*, 771 F.3d 1163, 1166 (9th Cir. 2014). Because the government needed to prove only one of the prior convictions for the enhanced penalty in this case, Carrasco's section 11351 conviction alone was sufficient to support his sentence, and we need not consider whether section 11350(a) is also divisible.

Second, Carrasco argues that the district court committed procedural error by improperly calculating his Guidelines range. Because Carrasco failed to offer any support for this allegation, this claim fails.

Third, Carrasco argues that his offense level for Count 63 should have been 20 rather than 30 because his conduct was "limited to harboring a fugitive." *See* U.S.S.G. § 2X3.1(a)(3)(A), (B), and (C). However, the district court found that Carrasco's actions exceeded merely harboring a fugitive because he (1) picked up

and dropped off David Garcia after he murdered Officer Pavelka so that Garcia could make his way to Mexico; (2) toasted Officer Pavelka's death; and (3) was tasked with investigating police officers' actions at the crime scene that evening, which the court determined was "important" in ensuring Garcia escaped apprehension. The court therefore did not abuse its discretion in refusing to cap his offense level at 20.

Fourth, Carrasco argues that the district court erred by rejecting his request for a minor role reduction and "substantially overstat[ing] the seriousness of his past convictions." In order to qualify for a minor role reduction, Carrasco must have demonstrated that his participation in the criminal activity was so "minimal or minor" that he was "substantially less culpable" than his co-participants. *United States v. Rosas*, 615 F.3d 1058, 1067 (9th Cir. 2010); *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006).

However, the district court adopted the presentence report finding that while Carrasco's role in VBS's drug trafficking was "limited to receiving and distributing drugs[,] . . . Carrasco was an average participant in the conspiracy," who "played a mutually supportive role," and was therefore "seen as equal in culpability to the other drug trafficking defendants." The evidence supports such a view, since Carrasco was convicted of possession with the intent to distribute at least 500 grams of cocaine, less than 50 grams of methamphetamine, and less than

100 kilograms of marijuana. In addition, criminal history departures under U.S.S.G. § 4A1.3 are "entirely discretionary under the Guidelines," and not subject to procedural challenge. *United States v. Ellis*, 641 F.3d 411, 421 (9th Cir. 2011). This court may review them only to determine a "sentence's substantive reasonableness," which Carrasco also challenges. *Id*. We find that Carrasco's 180-month sentence followed by eight years of supervised release was not substantively unreasonable, however, because the court reasonably considered Carrasco's history and the § 3553(a) factors in reaching its decision. The district court therefore did not err in denying Carrasco's minor role reduction request.

Finally, Carrasco challenges the terms of his supervised release conditions as being impermissibly vague under 18 U.S.C. § 3583. The conditions stipulate that Carrasco may not "associate with" any member of a "criminal street gang" or "disruptive group" and may not wear, display, use, or possess any item that "connotes affiliation" with or membership in VBS. Precedent forecloses three of Carrasco's arguments, as we have previously held that the terms "associate with," "criminal street gang," and "may connote" are not unconstitutionally vague. *See United States v. Soltero*, 510 F.3d 858, 866–67 (9th Cir. 2007) (per curiam). However, as the government concedes, we have previously found the term "disruptive group" to be impermissibly vague. *See id.* at 867. We therefore

REMAND for the district court to excise the phrase from Condition 7 of Carrasco's supervised release conditions. *Id.*

ii. Contreras

Contreras contends that his within-Guidelines 300-month sentence is substantively unreasonable. Because his sentence falls within the Guidelines range, we apply a presumption of reasonableness. *Gall*, 522 U.S. at 51.

Contreras was convicted of Counts 1–3 of the indictment, based in part on several recorded phone conversations between Contreras and other VBS members with whom he repeatedly discussed exchanging large amounts of methamphetamine and cocaine. Contreras's assertion that the court "obviously doubled" his sentence "simply because of his claimed membership in VBS, though he clearly had no role in the organization and had nothing to do with the matters with which he was charged in the indictment," therefore ignores the evidence in the record, the jury's verdict, and the court's findings. His sentence is not illogical, implausible, or without support.

iii. J. Mejia

J. Mejia contends that the Guidelines "in effect at the time of [his] sentencing were amended during the pendency of [his] appeal." He also points out that due to an intervening change in California law, his prior felony narcotics conviction has been designated a misdemeanor. *See* Cal. Penal Code § 1170.18(g).

However, it is unclear how the change in state law would affect his federal sentence given that his criminal history category is calculated based on the length of his prior sentence, not its classification. *See* U.S.S.G. § 4A1.1.

The government concedes that the Guidelines amendments make J. Mejia "potentially eligible for a sentence reduction." Its sole objection on appeal is that the correct way to request a sentence adjustment is to "file a motion in the district court, in the first instance, under 18 U.S.C. § 3582(c)(2)," so that the government would be "free to re-advance its original position that J. Mejia conspired to distribute 18 kilograms of cocaine."

While J. Mejia argues that such an action would "penalize" him by affirming a "now erroneous factual finding concerning his criminal history," this court has previously denied similar requests for resentencing without prejudice, so that defendants may move for an adjustment of their sentence in the district court. *See United States v. Ogo*, 298 F. App'x 664 (9th Cir. 2008). We therefore **DENY** J. Mejia's request without prejudice.

iv. S. Mejia

S. Mejia challenges the district court's mandatory minimum life sentence on the basis that the government failed to prove drug quantities. However, the district court's sentence was required under 21 U.S.C. § 841 (2006), given the jury's

cocaine base and methamphetamine findings and S. Mejia's prior felony drug offenses.

v. Mendez

Mendez argues that his 210-month sentence is substantively unreasonable because the district court denied him a minor role reduction under U.S.S.G. § 3B1.2 and his sentence is unreasonably high. The jury found Mendez guilty of Counts 1–3, 35, 36, and Racketeering Acts 1, 40(a), and 40(b), which included the distribution of large quantities of cocaine and marijuana. Based on this evidence, it was not erroneous for the court to conclude that Mendez "helped play an important role in [VBS's] drug trafficking activities."

Mendez's sentence was also not unreasonably high. Based on the drug quantities found by the jury, the district court appropriately applied an offense base level of 36. The resulting Guidelines range, given a criminal history category of III, was 235–293 months. The court considered the § 3553(a) factors, highlighting that Mendez was a successful musician whose prior convictions were minor and unrelated to drugs, and accordingly gave him a sentence below the Guidelines range. Mendez's sentence is not illogical, implausible, or without support.

vi. Meza

Meza contends that his sentence violated his due process rights because the district court relied on the allegedly erroneous fact that Meza was a member of

VBS. A defendant's due process rights are violated during sentencing where a court relies on "materially false or unreliable information." *United States v. Columbus*, 881 F.2d 785, 787 (9th Cir. 1989). To rebut his sentence, Meza needed to show that his classification as a VBS member was (1) false or unreliable, and (2) the basis for his sentence. *Id.* Meza can show neither.

First, ample evidence—including VBS graffiti in Meza's rental home and his extensive knowledge of VBS affairs—chronicled Meza's involvement in the VBS, making the conclusion that he is a VBS member neither false nor unreliable. Second, the district court clearly stated that while it was sure Meza was a gang member, it was "looking at Mr. Meza's drug trafficking activities as the primary force in the sentence" it chose to impose. Meza's gang membership was therefore not the basis for his sentence and his claim fails.

vii. M. Yepiz

M. Yepiz challenges his 240-month sentence as substantively unreasonable. Because his sentence falls within the Guidelines range, we may apply a presumption of reasonableness. *Gall*, 522 U.S. at 51.

Citing the within-Guidelines sentence overturned in *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), M. Yepiz asserts that his sentence is "similarly unreasonable." Based on evidence presented at trial, including a phone call where M. Yepiz discussed crystal methamphetamine with a

co-defendant, the district court found that he had been a "VBS gang member for many years," "was at [a] higher level of the . . . gang," and "was deeply involved in the [gang's] drug trafficking activities from the mid-1990s until his arrest." The court therefore found that M. Yepiz was a danger to the community and required a "substantial" sentence so that he could not commit further crimes. These findings distinguish this case from *Amezcua-Vasquez* and were not illogical, implausible, or without support.

viii. R. Yepiz

R. Yepiz challenges his mandatory life sentence, arguing that his two prior convictions under California Health and Safety Code section 11351 do not qualify as "felony drug offenses" for purposes of 21 U.S.C. §§ 841 and 851. Because R. Yepiz failed to raise this argument below, we review for plain error.

As discussed above in § XIV.i, section 11351 is divisible and subject to the modified categorical approach. The sentencing court therefore did not plainly err when it used the modified categorical approach to determine "which element [of section 11351] formed the predicate offense for [R. Yepiz's] conviction." *Coronado*, 759 F.3d at 985.

The sentencing court also did not plainly err in determining that documents submitted to the district court were sufficient to demonstrate that R. Yepiz's 1993 conviction was a "felony drug offense." The government submitted three

documents, including (1) a certified felony complaint in case BA066066 charging R. Yepiz in Count 7 with "possess[ion] for sale and purchase for sale a controlled substance, to wit, cocaine"; (2) certified minutes from case BA066066 showing that R. Yepiz withdrew a plea of "not guilty" and pled nolo contendere to "a violation of Section 11351 H&S in Count 07"; and (3) a certified Disposition of Arrest and Court action form in case BA066066 that, although partly illegible, shows R. Yepiz was charged under Count 7 with a violation of section 11351 and sentenced to two years imprisonment. This circuit has previously held that documents similar to those provided here were sufficient to establish a predicate offense for purposes of the modified categorical approach. *See, e.g., United States v. Strickland*, 601 F.3d 963, 970 (9th Cir. 2010) (en banc). The submitted documents were therefore sufficient to establish R. Yepiz's predicate offense under section 11351 as possession of a narcotic or controlled substance for sale, which falls squarely within the definition of "felony drug offense" under 21 U.S.C. § 841.

ix. Zambrano

Zambrano raises a procedural challenge to his sentence, arguing that the district court violated Federal Rule of Criminal Procedure 32(h) by failing to notify him of its intent to "depart" from the Guidelines range in imposing a 480-month sentence.

Rule 32(h) requires a district court to notify the parties before it may "depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission." Fed. R. Crim. P. 32(h). However, as noted by the Supreme Court in *Irizarry v. United States*, 553 U.S. 708 (2008), Rule 32(h) applies only to "departures," not "variances." *Id*. at 714. A "departure" refers to a "change from the final sentencing range computed by examining the provisions of the Guidelines themselves," while a "variance" refers to a sentence falling "above or below the properly calculated final sentencing range based on the application of statutory factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Moschella*, 727 F.3d 888, 893 (9th Cir. 2013) (quoting *United States v. Cruz-Perez*, 567 F.3d 1142, 1146 (9th Cir. 2009)).

Here, the district court determined Zambrano's Guidelines range to be 235 to 293 months. After lengthy consideration of the § 3553(a) factors, the court found that that range "fail[ed] to adequately capture . . . [Zambrano's] criminal conduct and history," and chose to impose a sentence of 480 months. Throughout the court's discussion, it did not state that it wished to "depart" from the Guidelines range, but instead that it wished to impose a higher sentence in light of the § 3553(a) factors. The court thus applied a variance rather than a departure and Rule 32(h) does not apply.

XV. Cumulative Error

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Here, however, we have largely found that the district court did not err. Furthermore, the cumulative effect of those instances where the error was not plain or was harmless do not require reversal because "it is more probable than not that, taken together, they did not materially affect the verdict." *Fernandez*, 388 F.3d at 1257.

We conclude that all other issues are without merit.

XVI. Conclusion

We **REMAND** to allow the district court to engage in the necessary factfinding to evaluate defendants' *Brady* claim and to amend Carrasco's conditions of supervised release; we **DENY** J. Mejia's request for a sentencing reduction without prejudice to filing a motion in the district court; and we **AFFIRM** as to all other issues.

APPENDIX E

FILED

NOV 20 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Yepiz, No. 07-50051

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

I concur in the amended memorandum disposition with the exception of Part XI(ii), from which I dissent for the reasons set forth in the majority opinion being withdrawn today.