

No.

IN THE
SUPREME COURT OF THE UNITED STATES

MANUEL YEPIZ, RAFAEL YEPIZ, ERNESTO OROZCO MENDEZ,
JOSE LUIS MEJIA, SERGIO MEJIA, GILBERTO CARRASCO,
FRANCISO ZAMBRANO, JESUS CONTRERAS, and MARIANO MEZA

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court violate Petitioners' Sixth Amendment right to a public trial when it held approximately two-thirds of the six-day voir dire in a closed jury room outside the presence of the defendants and the public, and the closure was over-broad, lacked sufficient justification, and available alternatives to closure existed?

2. Did the district court's failure to address the letter sent by Manuel Yepiz five months before trial started, requesting appointment of counsel because retained counsel was demanding significantly more money than he had been paid to try the case, require per se reversal of his conviction?

TABLE OF CONTENTS

OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	3
Public Voir Dire.....	3
Replacement of Retained Counsel for Appointed Counsel.....	3
REASONS FOR GRANTING THE WRIT.....	8
I. THE DISTRICT COURT VIOLATED PETITIONERS’ SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL WHEN IT HELD APPROXIMATELY TWO- THIRDS OF THE SIX-DAY VOIR DIRE IN A CLOSED JURY ROOM OUTSIDE THE PRESENCE OF THE DEFENDANTS AND THE PUBLIC.....	8
A. Applicable Law.....	8
B. This Overbroad and Unnecessary Closure Of A Majority of Voir Dire Violated The Sixth Amendment.....	9
1. The Closure Was Overbroad and Lacked Justification.....	10
2. Reasonable Alternatives To Closure Existed, And The District Court Made Insufficient Findings In Support of the Closure.....	12
II. THE FAILURE OF THE DISTRICT COURT TO CONDUCT ANY INQUIRY INTO MANUEL YEPIZ’S TIMELY REQUEST FOR APPOINTMENT OF COUNSEL DUE TO FINANCIAL PROBLEMS WITH RETAINED COUNSEL REQUIRES A NEW TRIAL.....	16
CONCLUSION.....	21

APPENDICES

Appendix A

Opinion filed December 20, 2016 (slip opinion)

United States v. Yepiz, et al., 844 F.3d 1070 (9th Cir. 2016)

Appendix B

Memorandum Decision filed December 20, 2016

Appendix C

Order filed November 20, 2017

United States v. Yepiz, et al., 875 F.3d 894 (9th Cir. 2017)

withdrawing published decision and denying petitions for rehearing

Appendix D

Memorandum decision filed November 20, 2017

Appendix E

Dissent filed November 20, 2017

concurring in part and dissenting in part

TABLE OF AUTHORITIES

CASES

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	2
<i>Klemm v. Astrue</i> , 543 F.3d 1139 (9th Cir. 2008)	18
<i>Presley v. Georgia</i> , 558 U.S. 209 (2010)	passim
<i>Press-Enterprise Company v. Superior Court of Cal.</i> , 464 U.S. 501 (1984)	8, 9, 12, 15
<i>Riley v. Deeds</i> , 56 F.3d 1117 (9th Cir. 1995)	19
<i>Sanders v. Union Pacific RR.</i> , 193 F.3d 1080 (9th Cir. 1999)	19
<i>United States v. Brown</i> , 785 F.3d 1337 (9th Cir. 2015)	16, 17, 20
<i>United States v. Campos</i> , 217 F.3d 707 (9th Cir. 2000)	4
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006)	17
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	15
<i>United States v. Parker</i> , 439 F.3d 81 (2nd Cir. 2006)	17
<i>United States v. Rivera-Corona</i> , 61 F.3d 976 (9th Cir. 2010)	16, 17, 20
<i>United States v. Yepiz, et al.</i> , 844 F.3d 1070 (9th Cir. 2016)	passim
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986)	15
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984)	8, 9, 14
<i>Weaver v. Massachusetts</i> , ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017)	15

STATUTES

18 U.S.C. § 1962	3
18 U.S.C. § 3006A	17
18 U.S.C. §3231	3
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	3
21 U.S.C. § 841.	3

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Petitioners Manuel Yepiz, Rafael Yepiz, Ernesto Orozco Mendez, Jose Luis Mejia, Sergio Mejia, Gilberto Carrasco, Francisco Zambrano, Jesus Contreras, and Mariano Meza respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on November 20, 2017.

OPINION BELOW

On December 20, 2016, the Court of Appeals issued a published opinion in this joint appeal. *United States v. Yepiz, et al.*, 844 F.3d 1070 (9th Cir. 2016). The majority

opinion, written by the Honorable John Noonan, vacated Manuel Yepiz's conviction for failure to timely address his request to replace retained counsel with appointed counsel. (Appendix A at 23 [slip opinion].) The Honorable Jacqueline H. Nguyen dissented from this reversal. (*Id.* at 23-36.) The unanimous panel also remanded the case as to the remaining defendants for fact finding as to whether there were *Brady*¹ violations concerning an informant. (Appendix A at 23.) On that same date, the court issued a memorandum opinion denying the remaining claims. (Appendix B.)

After Judge Noonan passed away, he was replaced by the Honorable M. Margaret McKeown. (Appendix C at 75.) On November 20, 2017, the Court of Appeals withdrew the published opinion and replaced it with a memorandum decision. (Appendices C and D.) The memorandum decision affirmed Manuel Yepiz's conviction but remanded the case as to all defendants for fact finding on the *Brady* claim. (Appendix D.) The various petitions for rehearing and rehearing en banc were denied. (Appendix C at 76.) The Honorable Stephen Reinhardt concurred in the remand but dissented in the decision not to reverse Manuel Yepiz's conviction. (Appendix E; See Appendix D at 92-93.)

JURISDICTION

On November 20, 2017, the Court of Appeals denied the petitions for rehearing. (Appendix C.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on February 20, 2018. Supreme Court Rules 13(3) and 30(1).

¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment (pertinent part)

“No person shall” “be deprived of life, liberty, or property without due process of law”

Sixth Amendment (pertinent part)

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... and to have the assistance of counsel for his defense.”

STATEMENT OF THE CASE

The petitioners, who were alleged to be members or associates of the Vineland Boys street gang, were convicted of various charges related to racketeering (RICO) and drug trafficking. (18 U.S.C. § 1962; 21 U.S.C. § 841.) Sentences ranged from 180 months to life. The two issues in this petition for writ of certiorari both involve the denial of rights deemed to be structural error.

Public Voir Dire

Jury selection in this nine-defendant gang RICO trial took place over the course of six days. Because the district court was concerned that comments from prospective jurors during voir dire might affect the open mindedness and fairness of the other jurors (RT (8/9/06) at 40), the district court required that all individual discussions with jurors occur in

the jury room. These closed discussions were not just for potentially prejudicial topics, but all generic hardship issues as well. Neither Petitioners (all of whom were shackled) nor the public was allowed to be present in this room. Over the course of jury selection, approximately two-thirds of voir dire occurred outside the presence of the defendants and public in the separate jury room.

Trial counsel objected that the manner in which voir dire was being conducted violated the defendants' right to be present. However, they did not specifically object that it violated the right to a public trial.

Petitioners argued on direct appeal that the district court violated their right to a public trial by holding approximately two-thirds of voir dire in a closed setting, away from both Petitioners and the public. The Ninth Circuit denied relief, finding that, under plain error review, Petitioners "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)." (Appendix D at 83.)

Replacement of Retained Counsel for Appointed Counsel

When he was arraigned on June 21, 2005, Manuel Yepiz filed a financial affidavit and CJA attorney Bernard Rosen was appointed to represent him. (CR 212, 216.)²

² "CR" stands for Clerk's Record. "RT" stands for Reporter's Transcript. "ER" stands for Excerpts of Record. "MYER" stands for Manuel Yepiz Individual Excerpts of Record. "MYSER" stands for Manuel Yepiz Sealed Excerpts of Record.

On November 14, 2005, retained attorney Nicolas Estrada substituted in for Rosen. (CR 561, MYER 1-3.)

On April 9, 2006, which was five months before the trial commenced on August 9, 2006 (CR 1714), Manuel,³ who was incarcerated at the Metropolitan Detention Center (“MDC”) under a permanent detention order (CR 212), wrote a letter to “the Honorable Judge Walters” requesting that the court appoint a “panel attorney” for him due to “financial differences” with Nicolas Estrada. (CR 1260, MYER 5.) The letter stated that Estrada was asking for \$200,000 to go to trial which was substantially more than the \$65,000 his family had paid him. If Estrada had been “truthful from the start, I would have never hired him.” (MYER 5.)

The clerk scanned the handwritten letter along with a “Notice of Document Discrepancies” (NDD) and filed it on PACER. (CR 1260.) The clerk did not check any of the boxes on the form indicating what the discrepancy was. The box that was checked at the bottom of the form stated that “The Document is **NOT** to be filed, but instead **REJECTED** ...” The form was dated 4/17/06 and signed by Judge Walter. (MYER 4, emphasis in the original.)

Shortly before trial began, on July 25, 2006, Manuel wrote another letter to Judge Walters asking for an “in camera” hearing so that he could request new counsel be

³ Three Yepiz brothers were indicted in this case, Manuel, Rafael, and Horacio. To avoid confusion Manuel may be referred to by his first name.

appointed to represent him due to an “ongoing lacking of communication” with present counsel. Manuel had yet to review any discovery. (CR 1693, MYSER 3.)

On July 31, 2006, Manuel wrote a third letter to Judge Walters complaining that “my lawyer has spent no time with me preparing my defense.” (CR 1692, MYSER 1.)

On August 1, 2006, the court scheduled a status conference for August 4, 2006, regarding Manuel’s letters and ordered attorney Estrada to appear. (CR 1585, 1597, MYER 6-7.) At the in camera hearing on August 4, the court gave Estrada a copy of the letters and ordered them to be filed under seal. The government was not present. (8/4/06 RT 4, MYSER 10-11.)

After reviewing the letters, Estrada said he had done an “exorbitant amount” of work in the case. (MYSER 12.) Manuel told the court that because Estrada did not have an email address he did not receive all the discovery from the government. (MYSER 15.)

Further, Manuel noted that he had sent a letter on April 9, to the court but it was signed by the court and returned to him. “This is not something that happened last week or a few weeks ago, your Honor, this has been going on.” (MYSER 16.) When the court said it had not signed any letter, Manuel responded that the court had signed a copy. (MYSER 16-17.)

When the court asked if there were anything else, Manuel said: “There are so many matters, your Honor. I mean, it’s ridiculous. I mean, I just have serious problems with him. A lot of serious problems. Communication.” (MYSER 17.) Manuel said that Estrada had no investigator (MYSER 19) and he was not “even sure if he’s a federal attorney.”

(MYSER 17.) A review of PACER reveals that Estrada had only one previous federal criminal case, a guilty plea to illegal entry. (Individual AOB at 7, n.3.)

The court dismissed Manuel's complaints as untimely and said: "You obviously don't appreciate" the "work that is involved in reviewing materials." (MYSER 25.) Estrada told the court that Manuel Yepiz was "the most insulting client I've had in my twenty years of practice." (MYSER 27.) After the trial was well underway, Manuel Yepiz wrote another letter to the court complaining that Estrada was not prepared and had lost interest in defending him due to money issues. "I am constantly harassed, every single day and several times per day as to paying more money." (MYSER 5.) The court said it could not get involved in compensation issues. (MYSER 35.)

On appeal, in the initial published opinion, the majority held that the district court abused its discretion by failing to conduct any inquiry into Manuel Yepiz's timely letter (mailed four months before trial started) to the court requesting appointment of counsel because he could not afford to pay Nicolas Estrada, his retained counsel, who was demanding \$200,000 to take the case to trial, after he had already been paid \$65,000. Manuel complained that if Estrada had been "truthful" about his fee he would not have hired him. At the initial arraignment Manuel filed a financial affidavit and was given appointed counsel. (CR 212, 216, 1260.) *United States v. Yepiz*, 844 F.3d 1070, 1077 (9th Cir. 2016). (Appendix A at 15-16.)

In the subsequent memorandum decision, the majority issued a brief decision affirming Manuel Yepiz’s conviction on the grounds that his letter only complained about financial differences, not ineffective assistance of counsel. Further, as he was represented by counsel, he was not supposed to write to the court. (Appendix D at 94.)

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT VIOLATED PETITIONERS’ SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL WHEN IT HELD APPROXIMATELY TWO-THIRDS OF THE SIX-DAY VOIR DIRE IN A CLOSED JURY ROOM OUTSIDE THE PRESENCE OF THE DEFENDANTS AND THE PUBLIC

A. Applicable Law

The Sixth Amendment guarantees a defendant the right to a public trial, which includes a right to have the public present during voir dire. *Presley v. Georgia*, 558 U.S. 209, 211-12 (2010). “The right of everyone in the community to attend the voir dire” “promotes fairness” and “[t]he open trial” plays an “important a role in the administration of justice.” *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 511 (1984). “The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions” *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

The “circumstances under which the press and public can be barred from a criminal trial are limited. The State’s justification in denying access must be a weighty one.” *Press-Enterprise Co.* 464 U.S. at 509-510. Accordingly, “[b]efore excluding the public from any stage of a criminal trial: ‘the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.’” *Presley*, 558 U.S. at 214 (quoting *Waller*, 467 U.S. at 48).

B. This Overbroad and Unnecessary Closure Of A Majority of Voir Dire Violated The Sixth Amendment

The district court elected to close individual voir dire discussions in order to keep the jurors’ comments from adversely affecting the fairness and impartiality of the venire. (RT (8/9/06) at 40 (advising jury that “it is very important that you not say in open court anything about the parties in this case or about any other matter which might tend to impair the open mindedness and fairness of the other jurors.”). To accomplish this, the district court did all private questioning of jurors in a separate jury room outside the presence of both the defendants and public. It declined to use side-bar conferences because of the number of attorneys involved in the case. This extraordinary procedure, however, extended not simply to discussions regarding potential biases (i.e. - fear of gangs), but also to virtually

all discussions about generic hardship issues. This voir dire procedure resulted in approximately two-thirds of the six-day voir dire occurring in the closed room.

1. The Closure Was Overbroad and Lacked Justification

Assuming, *arguendo*, that the district court's goal of insulating the jury venire from potentially prejudicial comments was a legitimate reason to conduct some select proceedings privately, the manner in which the district court executed its jury selection procedure was constitutionally flawed in multiple respects. Starting with the breadth of, and justification for, the closure, *see Presley*, 558 U.S. at 214, the district court closed significantly more of the voir dire than was necessary to protect the venire from exposure to potentially prejudicial comments, or to facilitate honest discussions about these issues. The district court also utilized the closed procedure extensively for discussions about common jury issues, such as personal hardship, that had absolutely nothing to do with its reason for closing individual voir dire discussions. In fact, potentially prejudicial issues which might have adversely affected the venire had they been held in public were the exception during these closed meetings, while discussions of hardship or other non-prejudicial issues represented the majority.

For instance, on the first day of voir dire, the district court asked the individuals in the jury box to raise their hands if the trial would cause an undue hardship to them. (RT 8/9/06 at 90.) Numerous jurors did so, and the district court then took each of them into the closed jury room to discuss their hardships. The first juror questioned in the closed jury room

talked about a hardship because of the length of the trial and the distance she lived from the district court. (RT 8/9/06 at 96-102.) The third juror questioned had a concern about the trial interrupting a pre-paid vacation. (*Id.* at 110-12.) The fourth questioned juror complained about back pain when sitting for long periods. (*Id.* at 113-17.) The fifth and sixth jurors complained about the economic effects of a long trial, as well as interference with a planned vacation. (*Id.* at 117-30.) Juror number eight discussed work obligations. (*Id.* at 131-38.) Jurors nine and ten both raised economic concerns. (*Id.* at 144-53.) On the first day of voir dire, there were just under twenty closed discussions, with nearly all of them concerning typical juror hardship issues that are routinely discussed in open court every day. (*Id.* at 1-197.)

The remaining days of voir dire, which included jurors' responses to a questionnaire, included vast amounts of time in which routine, non-prejudicial topics were discussed in the closed jury room. Multiple days saw the majority of jurors questioned in private discuss basic hardship issues rather than potentially sensitive bias or prejudice issues. (RT (8/10/06) at 1-140; RT (8/18/06) at 1-234.) Over the course of the six-day voir dire, where approximately two-thirds of the voir dire was conducted in the closed setting, discussions about typical hardship issues made up the majority of the closed conferences.

This closure was significantly “broader than [what was] necessary to protect th[e stated] interest of protecting the impartiality of the jury venire. *Presley*, 558 U.S. at 214. Closing two-thirds of voir dire is far from “trivial,” and doing so primarily to address

innocuous topics does not satisfy the “weighty” requirements for closing a trial. *See Press-Enterprise Co.* 464 U.S. at 509 (“Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.”). Even if the district court’s desire to shield the venire from potentially bias-inducing comments from other jurors, and to promote “more candid and forthright [expressions about] their feelings, beliefs, biases, and prejudice about gangs,” (RT (9/6/06) at 1992), comported with the Court’s public trial precedent, this is not what actually occurred over the six-day voir dire. Because the closure was much “broader than necessary to protect th[e] interest [in closing], *Presley*, 558 U.S. at 214, this voir dire procedure violated the Sixth Amendment.

2. Reasonable Alternatives To Closure Existed, And The District Court Made Insufficient Findings In Support of the Closure

Prior to closing proceedings to the public, a district court also must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. *See Presley*, 558 U.S. at 214. Two days before the start of trial, the district court informed counsel that it was going to adopt this voir dire procedure. (RT (8/7/06) at 77.) The district court stated that because there was not a room large enough to accommodate 300 persons, it would bring 50 potential jurors into the courtroom, and the remainder would stay in the jury assembly room linked by video. (*Id.*) The district court would put twelve jurors in the box, question each as to hardship, and for those that claimed

personal hardship issues, those would be discussed in the closed jury room. (RT (8/7/06) at 80.)

Counsel for Petitioner Meza subsequently suggested a straightforward alternative -- hold the follow-up questioning of individual jurors in the courtroom, and move the other jurors out while that occurred. (RT (8/11/06) at 44.) The district court rejected this proposal which would have allowed both Petitioners and the public to be present, stating that it was “physically impossible.” (RT (8/11/06) at 44.) The district court made no further findings at that time.

It was not until day fifteen of trial that the district court, in response to a mistrial motion on this issue, made specific findings. It found that the suggested procedure was not “feasible” because it did not account for the jurors in the courtroom or those watching via video, it did not address security concerns as to re-screening jurors or separating them from spectators, and there were no other facilities on that floor of the courthouse that would have kept all the jurors together and separate from the press and other spectators. (RT (9/6/06) at 1989-91.) The district court found that given these facts, “the private, limited questioning of the prospective jurors on these sensitive areas was appropriate in this case.” (*Id.*)

Starting with the district court’s consideration of “reasonable alternatives to closing the proceeding,” *Presley*, 558 U.S. at 214, the record does not support the conclusion that the district court gave reasonable consideration to alternatives to closing a majority of

voir dire. On the second day of voir dire, the district court made the decision to have the prospective jurors complete questionnaires. (RT (8/10/06) at 130.) The district court wanted the jurors in the courtroom to fill them out, but wanted them to do so outside the courtroom. Within a couple of minutes of electing to implement this procedure, the district court was able to find a location outside of the courtroom for the approximately forty jurors to do so. (*Id.* at 130-33.) Given that the district court was able to place this large number of prospective jurors outside the courtroom, with no notice, in order to have them fill out questionnaires, it seems that a “reasonable alternative[] to closing the proceeding,” *Presley*, 558 U.S. at 214, could have been found to afford Petitioners their public trial.

With regard to whether there were “findings adequate to support the closure[,]” *id.*, the district court made none as to why the hours and hours of generic hardship discussions had to occur in the closed setting. The district court found that “the private, limited questioning of the prospective jurors on these sensitive areas was appropriate in this case,” (RT (9/6/06) at 1991), but run-of-the-mill hardship discussions are not “sensitive.” The district court surmised prior to trial that a majority of the closed discussions would concern hardship discussions (RT (8/7/06) at 80), but it never explained, either prior to or during trial, why logistical, health, or economic constraints about serving on the jury needed to be held in private. The absence of findings as to why these sorts of discussions which comprised a majority of the closed voir dire proceedings needed to be held in private represents yet another failed prong of the *Waller* test.

In sum, while it might have been easier and faster to question individual jurors in the closed jury room, the Sixth Amendment right to a public trial does not contain a convenience exception. The “closure [was] broader than necessary to protect th[e] interest, the trial court [failed to] consider reasonable alternatives to closing the proceeding, and it [failed to] make findings adequate to support the closure.” *Presley*, 558 U.S. at 214.

Petitioners therefore ask the Court to grant review of this case to review the Ninth Circuit’s erroneous conclusion that, given this extraordinary record, the Court’s public trial precedent does not require the conclusion that this voir dire procedure violated Petitioners’ right to a public trial.⁴

In *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017) this Court recently held that the failure to object to exclusion of the defendant’s mother and her minister during voir dire because of overcrowding, did not automatically require reversal of the defendant’s conviction. Although denial of the right to a public trial is structural error, an allegation of ineffective assistance of counsel for failure to object to the

⁴ This error meets the substantial rights test and also should be noticed. Because “the effect of [a structural] violation cannot be ascertained,” such errors are “not amenable to harmless-error review.” *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986). This error also should be noticed, as the “promotion of fairness” that the public trial right guarantees, *Press-Enterprise Co.*, 464 U.S. at 511, was absent in the case due to extensive and unwarranted closure of voir dire. It goes directly to the “fairness, integrity or public reputation of judicial proceedings,” *Olano*, 507 U.S. 725, 736 (1993), when, instead of having an open and public jury selection, the majority of voir dire proceedings are held in secret outside the courtroom.

courtroom closure required a showing of prejudice. “[W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed.” 137 S.Ct. at 1912.

In this case, trial counsel did object that the manner in which voir dire was conducted violated the right of the defendants to be present but did not argue that it violated the right to public voir dire. Moreover, trial counsel did suggest alternatives to the way the court handled the individual questioning. This case thus presents an important opportunity to clarify whether the initial objection was sufficient to warrant a reversal on structural error grounds.

II. THE FAILURE OF THE DISTRICT COURT TO CONDUCT ANY INQUIRY INTO MANUEL YEPIZ’ TIMELY REQUEST FOR APPOINTMENT OF COUNSEL DUE TO FINANCIAL PROBLEMS WITH RETAINED COUNSEL REQUIRES A NEW TRIAL

The majority’s initial ruling overturning Manuel Yepiz’s conviction was dictated by *United States v. Rivera-Corona*, 61 F.3d 976, 978 (9th Cir. 2010) and *United States v. Brown*, 785 F.3d 1337, 1347 (9th Cir. 2015). (Appendix A at 19.)

Both *Rivera-Corona* and *Brown* observe that under the Sixth Amendment, defendants who have retained counsel have a right to counsel of choice and thus the right to discharge counsel for any reason, so long as it does not cause significant delay. If they are indigent, they have a right to appointed counsel. “Denial 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 1350.⁵ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

Rivera-Corona, 61 F.3d at 978, held that when a defendant asks to replace retained counsel with appointed counsel, the district court must conduct an appropriate inquiry into the defendant’s financial situation. *Id.* at 981-982, citing *United States v. Parker*, 439 F.3d 81, 92-93 (2nd Cir. 2006). “We note that requiring a retained counsel to continue to represent the defendant even if the defendant cannot pay him and no longer wants him” is “no substitute for appointed counsel paid with public funds.” *Rivera-Corona*, at 982. “The Criminal Justice Act expressly provides for appointment of counsel “[i]f at any stage of the proceedings ... the court finds that the defendant is financially unable to pay counsel whom he had retained.” *Id.* at 981, citing 18 U.S.C. § 3006A(c).

Second, as the majority pointed out, the NDD failed to inform Manuel Yepiz what the deficiency was. *Yepiz*, 844 F.3d at 1077, 1079. (Appendix A at 22, 25.) The docket sheet states that the “denial was based on: parties should not write letters to Judge.” *Id.* At 1079. (Appendix A at 25.) But the docket sheet would not have been sent to Manuel Yepiz

⁵ The dissent agreed that the “more prudent course would have been for the district court to take up his complaint. But the failure to do so under these circumstances is not per se reversible error.” *Yepiz*, 844 F.3d at 1084 (Nguyen, J., dissenting). (Appendix A at 30.) The dissent also believed that *Rivera-Corona* and *Brown* were wrongly decided. *Id.* at 1086. (Appendix A at 33.)

and as Estrada had no email address (and did not electronically file pleadings), he would have had no notice either.

The majority pointed out that the district court “clearly understood it was bound by such a duty” to inquire “given the speed with which it scheduled hearings regarding Yepiz’s July and September letters.” *Yepiz*, 844 F.3d at 1079. (Appendix A at 20.) The failure to comply with local rules 83-2.91 and 83-2.11 (prohibiting pro se contact with the court via letters or phone calls)⁶ did not excuse the court because the NDD did not give any reason for rejecting Manuel’s letter. *Ibid.* If Manuel Yepiz had been given an explanation “he would have been in a position to properly comply and could also have requested that his counsel file a motion asking to withdraw, a motion which his counsel would have been ethically obligated to file.” *Ibid.* The NDD failed to put Manuel on notice that the letter was rejected or “how he might rectify the deficiency.”⁷ *Id.* at 1080. (Appendix A at 22.)

In addition, the majority held that Manuel did not waive his Sixth Amendment rights for failing to reassert his request for appointed counsel at a suppression hearing on May 9, 2006. A constitutional right may only be waived “if it can be established by clear and

⁶ The current local rule 83-2.5 states: “Communications with the judge. Attorneys or parties to any action or proceeding shall refrain from writing letters to the judge, sending e-mail messages to the judge, making telephone calls to chambers or otherwise communicating with a judge in a pending matter, unless opposing counsel is present. All matters must be called to a judge’s attention by appropriate application or motion filed in compliance with these Local Rules.”

⁷ In his brief, Manuel pointed out that the clerk could not refuse to file his letter under Rule 5(e), Fed. R. Civ. Proc. *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008). (MYAOB at 13.)

convincing evidence that the waiver is voluntary, knowing, and intelligent” and “we indulge ever reasonable presumption against waiver of fundamental constitutional rights.” *Yepiz*, 844 F.3d at 1079, citing *Schell v. Witek*, F.3d at 1024. (Appendix A at 21.)

The majority emphasized that the “record was sufficiently clear” that Manuel’s letter requesting substitution of counsel was sent well before the trial started. The substitution would not have affected the court’s calendar. *Yepiz*, 844 F.3d at 1080. (Appendix A at 23.) If he still qualified as an indigent he was entitled to appointment of counsel. *Ibid.* “We therefore find that the district court abused its discretion when it arbitrarily and without explanation rejected Yepiz’ April 2006 letter.” *Ibid.*

The dissent stated, *inter alia*, that “it appears that the letter may have been bounced by court staff without the judge’s involvement” and further states it is unclear whether Judge Walter ever saw the letter and/or what his usual practice was. “Most judges have signature stamps for their courtroom deputy’s use.” *Yepiz*, 844 F.3d at 1082, n.2. (Appendix A at 25.)

It is highly doubtful that the district judge would direct his clerk to affix his signature to orders he never saw. But if he did and/or if the clerk took it upon him or herself to sign the judge’s name to an order rejecting a letter that the judge never actually saw, this alone is per se reversible error. *See Sanders v. Union Pac. RR.*, 193 F.3d 1080, 1081 (9th Cir. 1999) (en banc) (dismissal of civil action for failure to comply with pretrial preparation order reversed when a law clerk and not the judge presided over pretrial conference); *Riley*

v. Deeds, 56 F.3d 1117, 1122 (9th Cir. 1995) (habeas relief warranted for structural error when law clerk presided over jury deliberations when judge was absent and jury requested readbacks of testimony; judge failed to exercise any discretion over what testimony would be read and his unavailability required automatic reversal of conviction).

The subsequent replacement memorandum decision held that the district court did not abuse its discretion in failing to grant Manuel Yepiz's request for new counsel because his letter described "financial differences" between him and his retained counsel. (Appendix D at 94.) The very brief memorandum decision did not discuss the court's obligations under *Rivera-Corona* and *Brown*.

Further, the memorandum decision inaccurately stated: "The district court rejected the letter because 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." (Appendix D at 94.) As the published decision pointed out, the NDD did *not* state why it was being rejected. (Appendix A at 22.) And, as retained counsel did not even have an email address, he would not have been served with the letter in the first place.

This case presents an important opportunity to provide guidance to the lower courts as to *when* they must conduct inquiries into a criminal defendant's problems with retained counsel such that the defendant seeks appointed counsel. If it is true, as the dissent suggested in the published opinion, that the district court was never even given Manuel

Yepiz's letter by the clerk, this case presents the important opportunity to clarify that the district court's duties cannot be insulated by the failures of the clerk's office.

CONCLUSION

For the reasons expressed above, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

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