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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.