No. 18-10226

IN THE
United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MATTHEW WORTHING,
Defendant-Appellant.

On Appeal from the
United States District Court for the Northern District of California
No. 3:12-cr-00300 (Hon. Charles R. Breyer)

ANSWERING BRIEF FOR THE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment against defendant-appellant Matthew Worthing ("Worthing") on June 4, 2018, SER1-8, and he filed a timely notice of appeal on June 15, 2018, ER312.

BAIL/DETENTION STATUS

Worthing completed his 30-day term of imprisonment on November 13, 2018. He is serving a two-year term of supervised release.

STATEMENT OF THE ISSUES

1. Whether the Court should dismiss Worthing's appeal, where, as part of his plea agreement, he knowingly and voluntarily waived his rights to appeal his conviction and sentence, and where the language of the waiver encompasses the grounds on which he seeks to appeal.

If the Court agrees that the appellate waivers are enforceable, there are no other questions before the Court. As alternative arguments, the United States also addresses the following questions:

2. Whether the district court abused its discretion in denying Worthing's belated motion to withdraw his guilty plea, where (a) his

reason for seeking to withdraw his plea was simply a change of heart; (b) alleged errors in the plea colloquy did not occur or were harmless; and (c) he could have challenged the sufficiency of the mail-fraud-conspiracy charges before he pled guilty, and, in any event, the information properly charged the mail-fraud conspiracies.

3. Whether Worthing's guilty plea extinguishes his standalone challenge to the sufficiency of the information; and, in any event, whether that challenge or his standalone challenge to the plea colloquy warrants reversal, where both assert the same grounds as his challenge to the denial of his motion to withdraw his guilty plea.

4. Whether the district court abused its discretion in denying Worthing's motions to dismiss the information based on alleged judicial interference in plea negotiations and prosecutorial discretion, where (a) the motions were premised on the district court's denial of Worthing's motion to withdraw his guilty plea; and (b) that denial in no way involved the court in plea negotiations or prosecutorial discretion.

5. Whether the district court abused its discretion in sentencing Worthing to 30 days' imprisonment rather than probation where (a) his applicable Sentencing Guidelines range was 12-18 months'

imprisonment; (b) the court considered the totality of the circumstances in determining the appropriate sentence; (c) the court sentenced a comparable defendant to 30 days' imprisonment; and (d) Worthing was statutorily ineligible for probation.

STATEMENT OF THE CASE

In 2012, the government charged Worthing by information with bid rigging at real-estate foreclosure auctions in San Mateo County, in violation of 15 U.S.C. § 1 (Count 1); conspiracy to commit mail fraud in San Mateo County, in violation of 18 U.S.C. § 1349 (Count 2); bid rigging at real-estate foreclosure auctions in San Francisco County, in violation of 15 U.S.C. § 1 (Count 3); and conspiracy to commit mail fraud in San Francisco County, in violation of 18 U.S.C. § 1349 (Count 4). ER29, 32-36.[1] Worthing pled guilty to the information pursuant to a plea agreement. ER40-50.

[1] "ER" refers to Worthing's Excerpts of Record, and "SER" to the government's Supplemental Excerpts of Record. "PSR" refers to the Presentence Report filed under seal in this Court at Docket No. 57.

In 2018, Worthing moved to withdraw his guilty plea. ER114. The district court denied the motion, and later sentenced him to 30 days' imprisonment. SER1-8.

I. THE CONSPIRACIES TO RIG BIDS AT FORECLOSURE AUCTIONS

When a homeowner fails to make payments on a mortgage, the lender can foreclose, forcing the sale of the home to pay the outstanding loan. ER32. In California, foreclosures can be done through a non-judicial process. ER31. The lender initiates the process by recording a notice of default, and the home is sold at a public auction if the homeowner does not cure the default. ER31-32; Cal. Civ. Code § 2924. Typically, a trustee is appointed to oversee a public auction, which usually takes place at or near the county courthouse. ER32. An auctioneer, acting on behalf of the trustee, sells the property to the bidder offering the highest price. ER32. The proceeds of the auction are paid to the lender, and if any remain after discharging the mortgage, to any junior lienholders and then to the homeowner. PSR5.

From late 2008 to early 2011, a group of bidders conspired to rig bids at real-estate foreclosure auctions in San Mateo and San Francisco

Counties. SER309-320. Specifically, they agreed, either before or during the auctions, not to bid against each other, designating one conspirator to win the particular auction while the others refrained from bidding in exchange for cash payoffs. PSR5.

By suppressing competitive bidding, the conspirators depressed auction prices, allowing "winning" bidders to acquire properties for the lowest possible price—sometimes only a penny over the opening bid. PSR5. At the same time, "losing" bidders enriched themselves with payoffs. PSR5. Conversely, lenders and homeowners (where the auction price exceeded the amount owed) received less money than if the auctions had been conducted competitively. PSR5.

II. WORTHING'S PARTICIPATION IN THE CONSPIRACIES

Worthing first became involved in the bid rigging in August 2010. He recently had joined his father's real estate company, and attended an auction in San Mateo County with a business partner. PSR6. During the proceedings, his partner signaled to Worthing to stop bidding, later explaining that they would be paid around $6,000 for not bidding on the

property. PSR6. About 10 days later, Worthing received an envelope filled with cash from another conspirator. PSR6.

After that auction, Worthing began taking payoffs on his own. PSR6. He also paid others to refrain from bidding. For example, on October 1, 2010, he and a partner paid five others $2,000 each to stop bidding at an auction in San Mateo County. PSR6. All told, Worthing was involved in nine bid-rigging episodes, one in San Francisco County and eight in San Mateo County. He agreed not to bid on six occasions and paid others not to bid on three occasions. PSR7. Worthing later told the district court, "At the time of those nine deals, I filled my mind with justifications for actions that my heart always knew weren't right." SER35.

III. WORTHING'S GUILTY PLEA

1. On January 11, 2011, the FBI contacted Worthing, and, in a voluntary interview, he admitted to participating in the bid rigging. SER58-61. Shortly thereafter, he retained counsel, John Williams, an experienced white-collar defense attorney. SER48. Between August 2011 and March 2012, the government briefed counsel on the substantial evidence implicating Worthing in the conspiracies, including Worthing's

own admissions. SER44-45. On April 26, 2012, the government filed the four-count information. ER29. The information's "Penalty Sheet" described in detail the maximum penalties for each count. ER30. Worthing was arraigned on the information on May 17, 2012. SER95. He waived prosecution by indictment, attesting that he had been "advised in open court of [his] rights and the nature of the proposed charges against [him]." SER94.

2. On June 12, 2012, on advice of counsel, Worthing entered into a plea agreement, agreeing to cooperate with the government's investigation and plead guilty to the information. SER80-81.[2] The plea agreement set forth the four counts of the information and provided a detailed factual basis for each. SER80-84. Worthing agreed that these facts were true and that he was guilty of the charged offenses. SER81.

The agreement likewise set forth the maximum statutory penalties. As relevant here, the agreement recited that, for each bid-rigging count, Worthing could be imprisoned up to 10 years and fined up to $1 million.

[2] In his introduction, Worthing accuses the government of various "misdeeds." Br. 2-3. The government disagrees with these contentions but does not respond further because they are not germane.

SER84. For each mail-fraud-conspiracy count, he could be imprisoned up to 30 years and fined up to $1 million. SER85. The agreement also recited that the district court "may order restitution" and "is required" to impose a $100 special assessment per offense, for a total of $400. SER85; *see also* SER87.

The agreement stated that Worthing understood various trial and appellate rights, including the rights "to appeal his conviction, if he is found guilty," and "to appeal the imposition of sentence against him." SER79-80. It provided that he "knowingly and voluntarily waive[d]" the trial rights and the right to appeal his conviction. SER80. It further provided that he "knowingly and voluntarily waive[d]" the right to appeal or collaterally attack any sentence "consistent with or below the Sentencing Guidelines range stipulated by the parties." SER80.

The plea agreement provided Worthing significant benefits. As detailed therein, the parties stipulated to a volume of commerce of $917,987, just below the $1,000,000 threshold that would have triggered a two-level increase in Worthing's bid-rigging offense level; and to a fraud loss of $96,500, below the $120,000 threshold that would have triggered a two-level increase in his mail-fraud-conspiracy offense level. SER86;

SER42; U.S.S.G. §§ 2B1.1(b)(1), 2R1.1(b)(2) (2012). The parties also stipulated to a restitution amount of $15,000. SER87. In addition, the government agreed to seek downward adjustments to Worthing's total offense level for acceptance of responsibility and, if appropriate, for substantial assistance. SER87-88. The government also agreed not to bring further criminal charges against him for any related prior conduct. SER90.

Worthing averred that he "ha[d] thoroughly reviewed th[e] Plea Agreement with his attorney and ha[d] received satisfactory explanations . . . concerning each paragraph of [it]." SER91. He further averred that he "ha[d] reviewed all legal and factual aspects of this case with his attorney and [was] fully satisfied with his attorney's legal representation." SER91. Finally, he averred that, "[a]fter conferring with his attorney and considering all available alternatives, [he] ha[d] made a knowing and voluntary decision to enter into th[e] Plea Agreement." SER91. Both Worthing and his attorney signed the agreement. SER93.

3. That same day—June 12, 2012—Worthing pled guilty to the information. ER40. At the plea hearing, Worthing affirmed under oath

that he had received the charges against him and discussed them with his attorney, whose representation he was fully satisfied with. ER42-43. Worthing affirmed that he has a bachelor's degree; had read and discussed with his attorney the terms of his plea agreement before signing it; and understood the terms of the agreement. ER42-43. Worthing also affirmed that he was pleading guilty "of [his] own free will" because he was guilty, and not because of any threats or any promises outside of the written agreement. ER43-44.

After advising Worthing of the civil rights he would forfeit by pleading guilty, the district court asked the government to recite the "possible consequences of this plea." ER44. The government stated that Worthing was charged with four counts; described the maximum penalties for bid-rigging and mail-fraud conspiracy, alluding specifically to Counts 1 and 2; and explained that Worthing also faced restitution and a $100 special assessment per count, totaling $400. ER44-45. The court asked Worthing whether he understood those possible consequences, and Worthing said, "I do, Your Honor." ER45.

The district court advised Worthing of the trial rights he would waive by pleading guilty, and then addressed the basis for his plea.

ER46-47. The court had the government describe the essential elements of the offenses, and asked Worthing whether he believed the government could establish each element beyond a reasonable doubt. Worthing said, "I do, Your Honor." ER47. The court also directed Worthing to paragraph 4 of the plea agreement, which described the factual basis for each count of the information. ER47-48. The court asked Worthing whether he had "read that paragraph . . . carefully," to which Worthing responded, "Yes, I did, Your Honor"; and whether everything in it was "true and correct," to which Worthing responded, "It is." ER 48. The court then permitted the clerk to take the plea. ER48.

Asked how he pled to "Counts One Through Four of the Information," Worthing said, "I plead guilty." ER48. The district court found that Worthing was fully competent; that he was aware of the nature of the charges against him; that his plea was knowing and voluntary; and that the plea had an independent basis in fact as to each of the essential elements of the offenses. ER48. The court therefore accepted the plea. ER48.

IV. WORTHING'S CHANGE OF HEART

1. In July 2012, Worthing was interviewed by the government and described his participation in the bid rigging. SER50-61. Worthing and the government thereafter agreed to a series of continuances of his sentencing while the government pursued related cases, so that Worthing could continue his cooperation and the government could assess its value. *See, e.g.*, SER72-78. In October 2014, the grand jury charged five individuals (the "*Giraudo* defendants") with bid rigging and mail fraud in connection with real-estate foreclosure auctions in San Mateo and San Francisco Counties. *United States v. Giraudo,* No. 14-534 (N.D. Cal.); SER96-105. That case, like Worthing's, proceeded in the San Francisco Division. *Id.*

2. In August 2016, in a similar case in the Oakland Division, the district court dismissed mail-fraud charges against defendants who had rigged bids at real-estate foreclosure auctions in Contra Costa County. *United States v. Galloway*, No. 14-CR-607, 2016 WL 4269961 (N.D. Cal. Aug. 15, 2016). The government had charged those individuals with bid rigging and substantive mail fraud. *Id.* at *1, *6. The court dismissed the mail-fraud charges, concluding that they were defective for failing to

allege an actionable omission and to incorporate the bid-rigging allegations. *Id.* at *1. Rather than seek a superseding indictment, the government elected to pursue only the bid-rigging charges. SER46.

In the interest of parity, the government likewise dismissed the mail-fraud charges against the *Giraudo* defendants and offered to enter new plea agreements with various cooperating defendants who had previously pled guilty to bid rigging and mail fraud, provided that they agree to again plead guilty to bid rigging. SER46; SER69. Worthing initially agreed to schedule a hearing to enter a new plea agreement, ER107, but after changing counsel, he declined the government's offer and instead informed the district court that he would seek to withdraw his guilty plea, ER126.

At a December 2017 status hearing, the district court stated that it "under[stood] that Mr. Worthing was offered the same deal [as other defendants], and chose not to do it. That's fine." ER94. The court said it had "no opinion as to the merits of the [forthcoming] motion [to withdraw the guilty plea]," advising that it would "hear the motion and decide it." ER99.

3. On January 17, 2018, Worthing filed his motion to withdraw. As relevant here, he challenged the plea colloquy, alleging that the district court had failed to provide the advisements required by Rule 11(b)(1) about the consequences of perjury, the nature of and maximum penalties for each charge, the sentence-appeal waiver, the court's obligation to impose a special assessment, and the court's authority to order restitution. ER142-151. Citing *Galloway*, Worthing also alleged deficiencies in the information's description of the mail-fraud-conspiracy charges. ER114-16.

The district court denied the motion, concluding that Worthing had not advanced a fair and just reason for withdrawal. ER174. As to the plea colloquy, the court found that Worthing had been advised that he was pleading guilty to four counts and that he faced restitution and a special assessment. ER175. Any error in failing to advise him of the maximum penalties for Counts 3 and 4 was harmless, the court concluded, because, *inter alia*, his sentence would be far below the maximum. ER175-76. Similarly, the failure to advise him of the consequences of perjury was harmless because he did not claim to have perjured himself and was not facing prosecution for perjury. ER176.

Finally, "the proper remedy" for any failure to advise him of his appellate waiver would be for the Court of Appeals to hold the waiver unenforceable, not for the district court to allow him to withdraw his guilty plea. ER176.

As to the sufficiency of the information, the fact that a defendant might have been able to bring a successful motion to dismiss had he not pled guilty, the district court concluded, was not a fair and just reason to withdraw the plea. ER 175. The court recognized that "an intervening change in governing law may operate as a fair and just reason to withdraw a guilty plea," but noted that Worthing had not identified any such change as he pointed only to "non-binding recent authority." ER175.

4. Soon after the district court's ruling, Worthing filed two motions seeking dismissal of the information or (once again) withdrawal of his guilty plea. ER204; ER208. He argued that, in denying his withdrawal motion, the district court had interfered in plea negotiations and violated the separation-of-powers doctrine. ER204. The court construed the motions as a request for reconsideration of its denial of the withdrawal motion and denied them for the same reasons. ER209.

V. SENTENCING

As stipulated in the plea agreement, Worthing's applicable Guidelines range was 12 to 18 months' imprisonment. ER179; SER33. The government requested 12 months' imprisonment. SER26-31. Worthing sought a non-custodial term of probation. SER33.

Worthing attached to his sentencing memorandum a letter that explained, *inter alia*, his reasons for moving to withdraw his guilty plea. He said that, in his view, the charges did not reflect his "true level of participation in the scheme." SER36. He admitted that he "made bad decisions which resulted in [his] paying of others to acquire three properties without the others raising the auction bid, and also took money on another six [occasions] not to bid." SER35. "My motion to withdraw my plea," he said, "was in no way an attempt to skirt responsibility." SER36. He lamented, however, that he was charged with separate conspiracies for San Mateo and San Francisco Counties, whereas "many parties who ple[]d later than myself and have had much more illegal activity in both [of] these auctions were only facing single charges." SER36. He "was also personally bothered that defendants who

cooperated later and were more complicit than myself were treated in a more positive manner." SER36.

The district court sentenced Worthing to 30 days' imprisonment, to be followed by two years of supervised relief. SER26-31; ER179. The sentence was identical to that given a "comparable" defendant also involved in big rigging in San Mateo County. ER195. The court imposed a fine of $45,699, well below the statutory maximum; and restitution of $9,500, below the $15,000 stipulated in the plea agreement. SER26-31; SER87; ER180.

This appeal followed.

SUMMARY OF ARGUMENT

Worthing argues that the district court erred in denying his motion to withdraw his guilty plea, pointing to (1) alleged Rule 11(b)(1) errors in the plea colloquy and (2) alleged defects in the mail-fraud-conspiracy charges. For the first time on appeal, he also pitches these arguments as standalone claims. Additionally, Worthing attempts to recast the district court's denial of his withdrawal motion as judicial interference in plea negotiations and prosecutorial discretion. Finally, he asserts that his sentence of 30 days' imprisonment—far below the applicable Guidelines

range—is unreasonably "harsh" and disparate, and that he instead should have received a sentence of probation. None of these arguments warrant reversal.

1. Worthing's waivers of his rights to appeal his conviction and sentence bar this appeal. The waivers encompass all of the grounds on which he appeals, and he agreed to the waivers knowingly and voluntarily. The district court's failure to advise Worthing of his waiver of his sentence-appeal right, as required by Rule 11(1)(b)(N), does not invalidate the waiver because the record shows that he was aware of the waiver. Moreover, the Rule 11(1)(b)(N) error cannot invalidate Worthing's conviction-appeal waiver because the court was not required to advise him of that waiver.

2. The district court did not abuse its discretion in denying Worthing's motion to withdraw his guilty plea. Worthing moved to withdraw his plea because, years later, he felt he had been treated unfairly. A change of heart, however, is not a fair and just reason for withdrawing a guilty plea; that alone suffices to affirm. In addition, the alleged errors in plea colloquy either did not occur or were harmless; Worthing could have challenged the alleged defects in the mail-fraud-

conspiracy charges in 2012, before he pled guilty; and, in any event, the information properly stated the mail-fraud conspiracy charges.

3. Worthing's standalone claims based on the alleged errors in the plea colloquy and the alleged defects in the mail-fraud-conspiracy charges fail for the same reasons. Additionally, Worthing's guilty plea extinguished any challenge to the sufficiency of the information.

4. Worthing's claim of judicial interference in plea negotiations and prosecutorial discretion is unfounded. Worthing does not allege that the district court involved itself in the negotiations that led to his 2012 plea. In 2017, the government offered to dismiss the mail-fraud-conspiracy charges, provided that he plead guilty to the bid-rigging charges alone. Worthing declined the offer and moved to withdraw his plea. The district court's denial of that motion in no way involved it in plea discussions or prosecutorial discretion.

5. Worthing's below-Guidelines sentence was within the district court's broad discretion. Worthing's sole basis for challenging the sentence is his claim that other, in-his-view-more-culpable, defendants received more lenient sentences. Avoiding unwarranted disparities is but one factor in the sentencing calculus, however, and Worthing makes

no effort to show that his sentence was unreasonable in light of all of the relevant factors. In any event, the district court gave a comparable defendant the same sentence as Worthing; when the district court imposed probationary sentences on other defendants, it pointed to individualized circumstances such as poor health, age, family considerations, or withdrawal from the conspiracy; and Worthing was statutorily ineligible for probation

ARGUMENT

I. WORTHING'S APPELLATE WAIVERS BAR THIS APPEAL

The Court should enforce Worthing's waivers of his appeal rights, which bar all his conviction and sentencing claims. This Court reviews de novo whether a defendant has waived his right to appeal. *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016). "[P]roper enforcement of appeal waivers serves an important function in the judicial administrative process by 'preserv[ing] the finality of judgments and sentences imposed pursuant to valid plea agreements.'" *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996) (quoting *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992)).

"Where an appeal raises issues encompassed by a valid, enforceable appellate waiver, the appeal generally must be dismissed." *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011). A defendant's waiver of his appellate rights "is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made." *Lo*, 839 F.3d at 783 (internal quotation marks omitted). Here, both conditions are satisfied. In addition, the district court's failure to address Worthing's waiver of his right to appeal his sentence, as required by Rule 11(b)(1)(N), does not free him from either appellate waiver.

A. Worthing's Appellate Waivers Encompass His Grounds of Appeal and Were Knowing and Voluntary

1. The language of Worthing's appellate waivers encompasses all the grounds on which he seeks to appeal. "The scope of a . . . waiver is demonstrated by the express language of the plea agreement." *Lo*, 839 F.3d at 784. This Court has "consistently read general waivers of the right to appeal to cover all appeals, even an appeal from the denial of a motion to withdraw a guilty plea." *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011).

By its terms, Worthing's waiver of his right "to appeal his conviction," SER80-81, covers his claims that the district court abused its discretion in denying his motion to withdraw his guilty plea, his claims that the plea colloquy and information were defective, and his claim of judicial interference in plea negotiations—all of which challenge the validity of his conviction. *See* Br. 20, 33, 37, 48 (seeking "reversal" of his convictions on these grounds). Worthing's waiver of his right to appeal a "sentence [] consistent with or below the Sentencing Guidelines range stipulated by the parties," SER80, covers his challenge to his 30-day sentence because the sentence was below the Guidelines range—12 to 18 months—stipulated by the parties, SER87.

2. Worthing waived his appellate rights knowingly and voluntarily. "A waiver is voluntary if, under the totality of the circumstances, [it] was the product of a free and deliberate choice rather than coercion or improper inducement." *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc). "This court looks to the circumstances surrounding the signing and entry of the plea agreement to determine whether the defendant agreed to its terms knowingly and voluntarily." *Baramdyka*, 95 F.3d at 843.

The record clearly establishes that Worthing knowingly and voluntarily waived his appellate rights. The plea agreement explains—on the second page, in plain language—that Worthing is waiving his right "to appeal his conviction" and his right to appeal a "sentence [] consistent with or below the Sentencing Guidelines range stipulated by the parties." SER80-81. Worthing signed the agreement, confirming that he had (1) "thoroughly reviewed this Plea Agreement with his attorney and received satisfactory explanations from his attorney concerning each paragraph," and (2) "made a knowing and voluntary decision to enter into this Plea Agreement" after "conferring with his attorney and considering all available alternatives." SER91. At his plea hearing, held the same day he signed the plea agreement, Worthing stated under oath that he had read and discussed the plea agreement with his attorney before he signed it, and that he understood its terms. ER43. Tellingly, Worthing has never claimed, even now, that he was unaware of or did not understand the appellate waivers.

B. Worthing Cannot Evade His Appellate Waivers by Pointing to the District Court's Failure to Address His Sentence-Appeal Waiver

Rule 11 requires the district court to "inform the defendant of, and determine that the defendant understands," *inter alia*, "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N). The district court did not do so.[3] That omission, however, does not invalidate Worthing's appellate waivers because (1) Rule 11 addresses only a waiver of the right to appeal a *sentence*, meaning that the omission has no bearing on Worthing's waiver of his right to appeal his *conviction*; and (2) the error was harmless because the record establishes that Worthing was aware of his sentence-appeal waiver.

1. "[A] defendant's waiver of the right to appeal his sentence is distinct from a waiver of the right to appeal his conviction." *United States v. Spear*, 753 F.3d 964, 970 (9th Cir. 2014). Rule 11 requires the district court to address a waiver of "the right to appeal . . . the sentence," Fed.

[3] Worthing does not argue, and thus has waived any claim, *see Lo*, 839 F.3d at 787 n.3, that any other alleged deficiencies in the plea colloquy invalidated his appellate waivers, *see* Br. 19-20.

R. Crim. P. 11(b)(1)(N), "but neither that nor any other provision of Rule 11 requires the court to address the effect of the plea on other appeal rights as a matter of law," *United States v. Pattee*, 820 F.3d 496, 508 n.7 (2d Cir. 2016); *see also United States v. Vasquez-Martinez*, 616 F.3d 600, 604 (6th Cir. 2010) ("the sole obligation that the Rule places on the district court is to apprise a defendant of any plea-agreement provision waiving the right to appeal *a sentence*").

Accordingly, the district court committed no error regarding the conviction-appeal waiver, and Rule 11(b)(1)(N) provides no basis upon which to refuse to enforce that waiver. *Cf., e.g.*, *United States v. Barajas-Aguilar*, 648 F. App'x 681, 681-82 (9th Cir. 2016) (enforcing conviction-appeal waiver, finding "no arguable grounds for relief as to the validity of the waiver," but declining to enforce sentence-appeal waiver because of Rule 11(b)(1)(N) omission).

2. A waiver of sentence-appeal rights will not be enforced if a district court failed to comply with Rule 11(b)(1)(N) and that error prejudiced the defendant. *See, e.g.*, *United States v. Watson*, 582 F.3d 974, 987 (9th Cir. 2009). If, however, "evidence in the record shows that the defendant waived appellate rights knowingly and voluntarily," a Rule

11(b)(1)(N) error will not relieve the defendant of his waiver. *Lo*, 839 F.3d at 784. Here, the district court's error was harmless because "the record affirmatively demonstrates that [Worthing] was aware of the right[] at issue." *United States v. Villalobos*, 333 F.3d 1070, 1074 (9th Cir. 2003) (internal quotation marks omitted).[4]

The court considers the entire record in assessing whether a defendant knowingly and voluntarily waived his sentence-appeal right. *See United States v. Vonn*, 535 U.S. 55, 74-75 (2002). Factors relevant to that assessment include the clarity of the written plea agreement, the defendant's and defense counsel's signature on the agreement, the defendant's and the judge's statements at the plea hearing, and the

[4] Because Worthing failed to object to the Rule 11(b)(1)(N) deficiency at the plea colloquy, this Court normally would apply the plain-error standard in determining whether the deficiency invalidates the waiver. *See, e.g.*, *United States v. Ma*, 290 F.3d 1002, 1005 (9th Cir. 2002) ("Because [the defendant] did not object to this error at the Rule 11 colloquy, . . . this court must review the proceeding for plain error."). We assume, *arguendo*, that the harmless-error standard applies here because Worthing raised the deficiency as a ground for his motion to withdraw. *See Villalobos*, 333 F.3d at 1074. *Villalobos*, however, presented unique facts. The defendant moved to withdraw his guilty plea because a subsequent change in the law rendered a prior Rule 11 advisement inaccurate. *Id.* Unlike Worthing, the defendant in *Villalobos* could not have presented his claim at the time of colloquy.

defendant's age, condition, and level of intelligence and education. *See, e.g.*, *United States v. Lee*, 888 F.3d 503, 507 (D.C. Cir. 2018) (Kavanaugh, J.); *United States v. Johnson*, 626 F.3d 1085, 1089 (9th Cir. 2010); *United States v. Ma*, 290 F.3d 1002, 1005 (9th Cir. 2002).

There is abundant evidence that Worthing was aware that he was waiving his right to appeal his sentence, and did so voluntarily. The plea agreement states, in the first paragraph, that Worthing has the right "to appeal the imposition of sentence against him," and, in the second paragraph, that he "knowingly and voluntarily" waives his right to appeal a below-Guidelines sentence. SER79-81. The agreement further states that "[t]he defendant has thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory explanations from his attorney concerning each paragraph of this Plea Agreement." SER91. Both Worthing and his retained attorney signed the agreement, acknowledging its terms. SER93.

At his plea hearing, Worthing, who has a bachelor's degree, stated under oath that he had read the plea agreement and discussed its terms with his attorney, and that he understood its terms. ER41-42. Worthing assured the district court that he was "pleading guilty of his own free

will," ER44, and the court found that his plea was "knowing and voluntary," ER48.

Reviewing similar records, courts have concluded that defendants knowingly waived appellate rights. For example, in *Johnson*, this Court concluded that, even if the defendant was confused by questions about his appellate waiver at the plea colloquy, the colloquy did not affect his substantial rights "because the record show[ed] (1) [the defendant] had read his plea agreement, (2) reviewed it with his counsel, (3) signed the plea agreement and acknowledged his consent and understanding to the waiver of appeal, and (4) testified, confirmed by his counsel, that he was competent to participate in the plea hearing." 626 F.3d at 1089. Similarly, in *Lee*, the court of appeals concluded that the defendant had knowingly waived appellate rights because the language of the agreement was "crystal clear," the agreement stated that the defendant had read and fully understood its terms, his attorney signed the agreement and affirmed that he had fully discussed its provisions with his client, and the defendant stated at the plea hearing that he read the agreement "very carefully" and discussed it thoroughly with his attorney. 888 F.3d at 508. As in *Johnson* and *Lee*, the clarity of the agreement,

and Worthing's sworn assurances that he read the agreement, discussed it with his attorney, and understood its terms, readily show that Worthing knowingly and voluntarily waived his sentence-appeal rights.

The cases cited by Worthing do not assist him. In *United States v. Arellano-Gallegos*, 387 F.3d 794 (9th Cir. 2004), the defendant pled guilty to illegal reentry after deportation, pursuant to a plea agreement that included a sentence-appeal waiver. *Id.* at 796. The magistrate judge, who took the plea along with those of two other defendants, made no mention of the appeal waiver, either at the plea colloquy or in the findings-and-recommendations form. The district court then accepted the plea by signing the form. *Id.* at 796-97 & n.1. On appeal, this Court refused to enforce the waiver because there was "nothing . . . in the record" to indicate that the defendant "understood the right to appeal his sentence," much less that he "knew he was waiving his right to appeal his *sentence*." *Id.* at 797. Without more, the district court's "general questions whether [the defendants] had read and understood their 'five or six-page agreement'" did not establish a knowing waiver. *Id.*

Here, by contrast, there is much more in the record than a "general question" whether Worthing understood the plea agreement. The

agreement recited, in plain terms on the first two pages, both Worthing's right "to appeal the imposition of sentence against him" and his waiver of that right. SER80. The agreement stated that Worthing had discussed "each paragraph" of the agreement with his attorney, and both he and his attorney signed the agreement. SER91-93. At the plea colloquy, which took place the same day he signed the agreement, Worthing not only confirmed that he had read and discussed the agreement with his attorney before signing it, but also that he understood its terms. ER43. Finally, Worthing was a 33-year-old business person with a bachelor's degree from Villanova University. PSR11. Unlike in *Arellano-Gallegos*, then, the record "demonstrate[s] that [Worthing] knew he was waiving his right to appeal." 387 F.3d at 797.

Other cases relied upon by Worthing are even farther afield. In *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995), the district court twice told the defendant that he retained a right to appeal, contrary to the terms of the plea agreement. Here, the district court said nothing contradicting the term of Worthing's plea agreement. In *United States v. Sura*, 511 F.3d 654, 656, 662 (7th Cir. 2007), the defendant, unlike Worthing, was elderly, undergoing mental-health treatment, and on

medication, and offered "confused responses" at the plea hearing; moreover, the district court did not inquire whether the defendant had reviewed the plea agreement with his attorney. Similarly, in *United States v. Murdock*, 398 F.3d 491, 494, 497 (6th Cir. 2005), the district court did not ask the defendant if he had been given an opportunity to read over the plea agreement and discuss it with his attorney. In fact, the *Murdock* court suggested that a defendant's assurance that he discussed the plea agreement with his attorney—as happened in this case—could serve as a "functional substitute" for the Rule 11(b)(1)(N) advisement. *Id.* at 497-98.

In sum, Worthing's challenges to his conviction and sentence are barred by his appellate waivers,[5] and this Court should dismiss his appeal. Although none of Worthing's challenges are properly before the Court, we nevertheless address those challenges—all of which fail on

[5] In a footnote, Worthing suggests that his judicial-interference claim is not barred by his conviction-appeal waiver because the claim goes to the knowing and voluntary nature of the plea agreement. Br. 20 n.4. But that cannot be true because Worthing agreed to the waiver in 2012, whereas the alleged interference supposedly took place in 2018. *See, e.g.*, Br. 39.

their merits. *See* Sections II – IV (challenges to conviction); Section V (challenge to sentence).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING WORTHING'S MOTION TO WITHDRAW HIS GUILTY PLEA

Nearly six years after his guilty plea, Worthing moved to withdraw the plea, alleging errors in the plea colloquy and defects in the mail-fraud-conspiracy charges. He now incorrectly argues that the district court abused its discretion in denying the motion. Br. 33, 49-51. To the contrary, he presented no fair and just reason for withdrawal.

A. Legal Principles

A defendant may withdraw a guilty plea after the court accepts it, but before sentencing, if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). The burden of persuasion rests on the defendant. *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003). Although the fair and just standard "is applied liberally," *United States v. Yamashiro*, 788 F.3d 1231, 1237 (9th Cir. 2015), a defendant "may not withdraw his guilty plea 'simply on a lark,'" *United States v. Ensminger*, 567 F.3d 587, 590 (9th Cir. 2009) (quoting *United States v. Hyde*, 520 U.S. 670, 676-77 (1997)).

"A district court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion." *Id.* "A defendant does not always have the right to withdraw a plea because the decision to allow withdrawal of a plea is solely within the discretion of the district court." *Nostratis*, 321 F.3d at 1208. "As innumerable cases have said, a ruling on a motion for leave to withdraw a plea of guilty or nolo contendere is discretionary with the trial court, and an appellate court will rarely interfere with the exercise of this discretion." 1A Charles Alan Wright et al., *Federal Practice and Procedure* § 181 (4th ed. 2008).

B. Worthing's Long-Delayed Second Thoughts Are Not a Fair and Just Reason for Withdrawal

As revealed at sentencing, Worthing's motion to withdraw his guilty plea was the product of second thoughts. This alone suffices to affirm. *See United States v. Mayweather*, 634 F.3d 498, 504 (9th Cir. 2010) (this Court may affirm the denial of a withdrawal motion for any reason supported by the record). This Court's decisions "make clear that a change of heart—even a 'good faith change of heart'—is not a fair and just reason to withdraw [a] plea, even where the government incurs no prejudice." *Ensminger*, 567 F.3d at 593 (quoting *United States v. Rios-*

Ortiz, 830 F.2d 1067, 1069 (9th Cir. 1987)). Here, as Worthing himself explained, he sought to withdraw his plea because, in retrospect, he felt that he had been treated unfairly. Specifically, he was "personally bothered that defendants who cooperated later and were more complicit than myself were treated in a more positive manner." SER36. This "change of heart does not warrant withdrawal." *United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990) (defendant's belief that "I am being blamed for a lot of stuff I didn't do" was not a fair and just reason).

In addition, Worthing's motion offered no adequate explanation why he waited nearly six years to raise putative deficiencies in the plea colloquy and the information. *See, e.g.*, *Yamashiro*, 788 F.3d at 1237 (no abuse of discretion in denying withdrawal motion because, *inter alia*, defendant waited "until almost a year after his plea"). "If a defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force." *Nostratis*, 321 F.3d at 1211 (quoting Advisory Committee Notes). Indeed, there was a strong likelihood of prejudice to the government had it been forced to renew its prosecution after such a lengthy lapse of time, SER38-40; *see United States v.*

Vasquez-Valasco, 471 F.2d 294, 294 (9th Cir. 1973) ("Prejudice to the government is one factor to be considered by the district court in its evaluation of the merits of the defendant's motion to withdraw his plea."). These considerations, too, strongly support affirmance.

C. The Alleged Errors in the Rule 11 Plea Colloquy Are Not a Fair and Just Reason for Withdrawal

Rule 11 requires that, before accepting a guilty plea, "the court must address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands," certain consequences of his guilty plea. Fed. R. Crim. P. 11(b)(1). "A variance from the requirements of this rule," however, "is harmless error if it does not affect substantial rights." Fed. R. Civ. P. 11(h). A harmless Rule 11(b)(1) error is not a fair and just reason to withdraw a guilty plea. *See United States v. Vonn*, 535 U.S. 55, 72 n.9 (2002); *United States v. Villalobos*, 333 F.3d 1070, 1074 (9th Cir. 2003). A Rule 11(b)(1) error is harmless if the record shows that the defendant "was aware of the rights at issue when he entered his guilty plea." *Id.* (quoting *United States v. Minore*, 292 F.3d 1109, 1119 (9th Cir. 2002)).

The district court did not abuse its discretion in concluding that alleged errors in the plea colloquy did not provide a fair and just reason for withdrawal. First, the district court did, in fact, advise Worthing of the nature of charges against him, of the potential imposition of restitution, and of the required imposition of a special assessment. Second, all of the alleged errors were harmless[6] because the record demonstrates that Worthing was aware of the rights in question at the time he pled guilty. *See Villalobos*, 333 F.3d at 1074. Moreover, Worthing makes no claim that he would have pleaded differently absent the alleged errors, asserting only (Br. 30-31) that this Court cannot "assume" or be "assure[d]" that his plea was knowing and voluntary. *See United States v. Escamilla-Rojas*, 640 F.3d 1055, 1061 (9th Cir. 2011) (finding Rule 11 violation harmless where, "perhaps most importantly, [defendant] does not now allege that she would have pleaded differently").[7] Third, for the alleged errors involving the sentence-appeal-waiver, special-assessment, restitution, and perjury advisements,

[6] *See* footnote 4 *supra*.

[7] Any such claim, of course, would conflict with Worthing's own explanation for the motion to withdraw. *See* SER36.

permitting withdrawal of the guilty plea would not have been an appropriate remedy.

1. Sentence-Appeal Waiver

The district court's failure to address Worthing's sentence-appeal waiver during the plea colloquy was harmless because the record establishes that Worthing knew of the right he was waiving. *See* Section I.B.2 *supra*. Moreover, as the district court observed, even if Worthing had not understood that he was waiving his right to appeal his sentence, his remedy would be non-enforcement of the waiver, not withdrawal of his plea. ER175. When faced with a prejudicial Rule 11(b)(1)(N) error, this Court has refused to enforce the waiver. *See, e.g.*, *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004).[8] To permit a defendant to withdraw a guilty plea—where the defendant understood

[8] *See also, e.g.*, *United States v. Pugh*, 668 F. App'x 273, 273 (9th Cir. 2016); *United States v. Barajas-Aguilar*, 648 F. App'x 681, 681-82 (9th Cir. 2016); *United States v. Partin*, 565 F. App'x 626, 626 (9th Cir. 2014); *United States v. Santos*, 481 F. App'x 346, 347 (9th Cir. 2012); *United States v. Morales-Escobedo*, 367 F. App'x 804, 805 (9th Cir. 2010). Although the Circuits "vary in their approaches to the remedy" for a Rule 11(b)(1)(N) error, *see United States v. Lee*, 888 F.3d 503, 507 n.2 (D.C. Cir. 2018) (Kavanaugh, J.), Worthing is bound by this Court's law and practice.

the charges he was pleading to and the other consequences of his plea—because he did not understand that he was waiving his right to appeal the forthcoming sentence would grant that defendant a "windfall." *United States v. Rogers*, 984 F.2d 314, 319 (9th Cir. 1993). The district court did not abuse its discretion in declining to grant Worthing such a windfall.

2. Nature of the Charges

Rule 11 requires that the district court advise the defendant of "the nature of each charge to which the defendant is pleading" and "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed. R. Crim. P. 11(b)(1)(G)-(H). The district court gave these advisements, and any error in its manner of doing so was harmless.

At the plea hearing, the district court instructed the government to describe the essential elements of the offenses. ER47. The government explained that bid rigging requires that "the defendant [have] participated in a conspiracy to suppress and restrain competition by rigging bids to obtain selected properties offered at public real estate foreclosure auctions, in unreasonable restraint of interstate trade and

commerce." ER47. The government explained that mail-fraud conspiracy requires "an agreement between two or more persons to commit the crime of mail fraud," and that the defendant "bec[o]me a member of [the] conspiracy [knowing] of at least one of its objects and intending to help accomplish it." ER47; *see also* ER44-45. The court then asked Worthing whether he believed the government could prove those elements beyond a reasonable doubt, and he responded affirmatively. ER47.

Next, the court specifically directed Worthing to Paragraph 4 of the plea agreement (on pages 3 to 6), which details the factual bases for the four charged offenses. ER47-48; SER81-84. The court had Worthing confirm that he "read that paragraph and those pages carefully," and that "everything that is contained in that paragraph [is] true and correct." ER48.

Worthing's suggestion (Br. 28) notwithstanding, the plea colloquy likewise made clear the number of charges to which he was pleading guilty. At the court's prompting, the prosecutor stated that "the defendant is charged with four counts in the Information." ER44. Moreover, when the clerk inquired, "how do you plead to Counts One

Through Four of the Information," Worthing responded, "I plead guilty." ER48.

The district court also provided Worthing a description of the possible consequences of a guilty plea. At the court's direction, the government explained that the maximum penalties for big rigging and conspiracy to commit mail fraud include, *inter alia*, "a term of imprisonment for ten years" and "a term of imprisonment for 30 years," respectively. ER44-45. The court asked Worthing if he understood those consequences, and Worthing responded affirmatively. ER45.

Worthing suggests that the district court erred because parts of these descriptions came from the prosecutor rather than the court. Br. 28. But the prosecutor spoke at the direction of the court, and the court followed up on the prosecutor's descriptions by ensuring that Worthing understood them. Even if that was error, there was no prejudice because the procedure conveyed the required information. *Cf. Ma*, 290 F.3d at 1005 (district court's failure to discuss appellate waiver not prejudicial because "the prosecutor set out the waiver provision").

In addition, Worthing had received the required advisements in prior writings and proceedings. Specifically, page 2 of the information,

which Worthing acknowledged having received, ER42, set forth the maximum penalties for each of the two sets of charges, ER30; *cf. Vonn*, 535 U.S. at 75 ("a defendant with a copy of his indictment before pleading guilty is presumed to know the nature of the charge against him"). Worthing also was advised of the nature of the charges at his initial appearance, SER95, as he attested in his Waiver of Indictment, SER94; *cf. Vonn*, 535 U.S. at 75 (noting significance in Rule 11-prejudice analysis of advisements made at initial appearance). Additionally, the plea agreement detailed the four charges, their elements, and the factual bases and maximum penalties for each. SER80-85. Worthing confirmed that he had read, discussed with his attorney, and understood each paragraph of that agreement. SER91; *see also* ER43; c*f. Escamilla-Rojas*, 640 F.3d at 1061 (explicit statements of understanding, "made contemporaneously" with a defendant's plea, "should be accorded great weight" (internal quotation marks omitted)).

Finally, any error in advising Worthing of the maximum penalties also was harmless because he was sentenced below the maximum of which he was advised. ER175-76. He was advised, at the very least, that he faced "a term of imprisonment for ten years" and "a fine of not more

than $1 million." ER45. The court sentenced him to a total term of 30 days' imprisonment and imposed a total fine of $45,699. SER1-8. Any error thus was harmless. *See United States v. Morales-Robles*, 309 F.3d 609, 611 (9th Cir. 2002) (harmless error if defendant "knew that he could be sentenced to a term as long as the one he actually receives"); *United States v. Crawford*, 169 F.3d 590, 593 (9th Cir. 1999) (failure to advise defendant of mandatory restitution harmless because "he was ultimately required to pay less than what he had been advised he might actually owe").

None of the cases cited by Worthing establish that the district court's description of the charges was insufficient. In *Villalobos*, 333 F.3d at 1074, a subsequent Supreme Court decision rendered the district court's description of an element of the offense affirmatively inaccurate. In *United States v. Pena*, 314 F.3d 1152, 1156 (9th Cir. 2003), the district court "[m]erely ask[ed] [the defendant] whether he had read the plea agreement and ask[ed] the attorney whether the *attorney*, *not* [the defendant], understood and agreed with the elements of the offense." In *United States v. Smith*, 60 F.3d 595, 600 (9th Cir. 1995), there was a

"total absence of any reference at the plea hearing to the charge or its nature."

Here, by contrast, the district court, among other actions, specifically directed Worthing to a detailed description of the four charges and their factual bases, and had him confirm that he had read that description carefully and that it was correct. In fact, *Pena* and *Smith* suggest that such a procedure satisfies Rule 11. There, the Court noted that "the provision of the plea agreement describing and explaining the crime 'was not recited or even referred to in the plea proceeding.'" *Pena*, 314 F.3d at 1157 (quoting *Smith*, 60 F.3d at 599). In short, the district court did not abuse its discretion in concluding that Worthing was adequately advised of the nature of the charges, the number of counts to which he was pleading, and the maximum penalties for each. ER175.

3. Restitution and Special Assessment

Rule 11 requires the district court to advise the defendant of "the court's authority to order restitution" and "the court's obligation to impose a special assessment." Fed. R. Crim. P. 11(b)(1)(K)-(L). Here, too, Worthing was advised of these consequences at the plea hearing, and any error in the manner of advisement was harmless.

At the plea hearing, the district court directed the prosecutor to state the consequences of a guilty plea. The prosecutor twice recited the court's obligation to impose a special assessment, stating that Worthing was subject to "a $100 special assessment per penalty totaling $400," and repeating that he was subject to "a $100 special assessment per count." ER45. In the course of the same description, the prosecutor stated that "restitution" also could be imposed. ER45. Worthing confirmed to the court that he understood these consequences. ER45. Because he was made aware of them at the plea colloquy, any error by the district court was harmless. *Cf. Ma*, 290 F.3d at 1005.

Moreover, the plea agreement described these same consequences in clear and unmistakable terms. The agreement twice explains the court's obligation to impose a special assessment, SER85; SER87, with Worthing's acknowledging that he "understands that the Court will order him to pay a special assessment of $100 per count ($400)," SER87. Likewise, the agreement twice discusses restitution, SER85; SER87, and provides that "[t]he government and the defendant agree to recommend that the Court order the defendant to pay restitution in the amount of $15,000," SER87. The defendant assured the district court that he had

read and discussed the agreement with his attorney, ER42-43, and he cannot now claim (nor does he) that he was ignorant of the consequences highlighted therein, *see Ma*, 290 F.3d at 1005 (in finding lack of prejudice, noting that defendant "had acknowledged in writing that she read and understood the plea agreement").

Any error also was harmless because Worthing was advised at the plea colloquy that he was subject to a fine in an amount in excess of the total amounts he ultimately paid in fines, restitution, and special assessments. *Crawford*, 169 F.3d at 593. He was advised that he faced fines of up to a million dollars, ER45, far above the $55,599 (a fine of $45,699, $9,500 in restitution, and a special assessment of $400) he was ultimately required to pay, SER1-8. Thus, in sentencing Worthing, the district court cured any possible error in the plea colloquy.

4. Perjury

Rule 11 requires the district court to advise the defendant of "the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath." Fed. R. Crim. P. 11(b)(1)(A). The district court omitted this advisement during the plea colloquy, but, in denying the withdrawal

motion, properly concluded that the error was "harmless, given that Worthing does not state that he perjured himself, and is not facing prosecution for perjury." ER176.

This Court has determined that a failure to advise a defendant of a potential perjury prosecution is harmless if the defendant is not in fact prosecuted for perjury. *United States v. Vonn*, 294 F.3d 1093, 1094 (9th Cir. 2002) (defendant suffered no prejudice because the government did not initiate a perjury prosecution); *see also United States v. Graves*, 98 F.3d 258, 259 (7th Cir. 1996) (stating that a violation of the rule was harmless because "there is no current prospective prosecution of [the defendant] for perjury," and collecting cases). Moreover, if the violation were not harmless, "the proper sanction would be exclusion of the statement from [] trial rather than throwing out the guilty plea." *Graves*, 98 F.3d at 259; *see also United States v. Conrad*, 598 F.2d 506, 509 n.1 (9th Cir. 1979). The district court properly declined to allow Worthing to withdraw his plea on the basis of this omission.

D. Worthing's Belated Decision to Challenge the Mail-Fraud-Conspiracy Charges Is Not a Fair and Just Reason for Withdrawal

The district court did not abuse its discretion in rejecting Worthing's belated challenge to the sufficiency of the information as a basis for withdrawing his guilty plea. Nothing prevented Worthing from challenging the mail-fraud-conspiracy charges before he pled guilty, and, in any event, the information sufficiently stated the charges.

1. The district court properly concluded that the possibility "that [Worthing] might have been able to bring a successful motion to dismiss had he not pled is not a fair and just reason for requesting withdrawal." ER175. "A marked shift in governing law that gives traction to a previously foreclosed or unavailable argument may operate as a fair and just reason to withdraw a guilty plea." *Ensminger*, 567 F.3d at 592. No such shift occurred here, however, as Worthing relied for his argument on *Galloway*, a non-binding district-court decision. ER175. "A previously unavailable basis for a motion to dismiss did not suddenly materialize." *Ensminger*, 567 F.3d at 592.

Four years after Worthing's plea, defendants in another proceeding moved successfully to dismiss substantive mail-fraud charges. *United*

States v. Galloway, No. 14-CR-607, 2016 WL 4269961 (N.D. Cal. Aug. 15, 2016). Even if *Galloway* suggested that Worthing's mail-fraud-conspiracy charges likewise were defective (which it does not), that would only underscore that he could have—and should have—moved for dismissal in 2012 instead of pleading guilty. It simply is not the law that "courts must permit withdrawal prior to sentencing if a defendant can point to some court decision somewhere that offered him hope of escaping conviction or otherwise caused him to second-guess his prior decision to plead guilty." *Ensminger*, 567 F.3d at 594; *cf. United States v. Showalter*, 569 F.3d 1150, 1156 (9th Cir. 2009) (a defendant's "belief that the government had a weaker case than he originally thought does not constitute a fair or just reason").

2. The mail-fraud-conspiracy charges were not defective. An information "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An information "is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

United States v. Davis, 336 F.3d 920, 922 (9th Cir. 2003) (quoting *United States v. Bailey*, 444 U.S. 394, 414 (1980)). "In cases where the [charging document] 'tracks the words of the statute charging the offense,' the [charging document] will be held sufficient 'so long as the words unambiguously set forth all elements necessary to constitute the offense.'" *Id.* (quoting *United States v. Fitzgerald*, 882 F.2d 397, 399 (9th Cir. 1989)).

Worthing tardily challenged the information, *United States v. Rodriquez*, 360 F.3d 949, 958 (9th Cir. 2004), so it is "liberally construed in favor of validity," *United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000) (quoting *Echavarria-Olarte v. Reno*, 35 F.3d 395, 397 (9th Cir. 1994)). Thus, "it is only required that the necessary facts appear *in any form* or *by fair construction* can be found within the terms of the [charging document]." *United States v. Holden*, 806 F.3d 1227, 1233 (9th Cir. 2015) (quoting *United States v. James*, 980 F.2d 1314, 1316 (9th Cir. 1992)).

Counts 2 and 4 of the information charged Worthing with conspiracy in violation of 18 U.S.C. § 1349. ER33; ER36. Section 1349 sanctions "[a]ny person who attempts or conspires to commit any offense under [the Fraud] Chapter," 18 U.S.C. Ch. 63. The essential elements of

a substantive mail-fraud offense, 18 U.S.C. § 1341, are "(1) a scheme to defraud; (2) materiality of the statements made in furtherance of the scheme; (3) an intent to defraud; and (4) use of the mails," *United States v. Lo*, 839 F.3d 777, 788 n.5 (9th Cir. 2016); *see also* 18 U.S.C. § 1341; 9th Cir. Model Crim. Jury Instr. § 8.121 (2019).

Worthing argues that the mail-fraud-conspiracy charges were insufficient because they (1) failed to adequately allege the scheme-to-defraud and materiality elements of substantive mail fraud; and (2) did not incorporate the bid-rigging charges. Accordingly, this Court "assume[s] all the other elements are sufficiently alleged, and . . . consider[s] only whether the [information] was deficient on [these] ground[s]." *Davis*, 336 F.3d at 922. Both of Worthing's arguments fail.

Because Worthing was charged with conspiracy, the information did not need to "allege the offense that is the object of the conspiracy with the same precision as would be necessary where that offense is itself the crime charged." *Lo*, 231 F.3d at 481 (citing *Wong Tai v. United States*, 273 U.S. 77, 81 (1927)). Under this "forgiving" standard, even a charge "that omit[s] *any* explication whatever of the offense that is the object of the conspiracy other than a citation to the United States Code" is not

necessarily defective, even if challenged in a timely manner. *Id.* This Court accordingly has sustained conspiracy indictments "in which elements of the object offense have been not merely imprecisely stated but completely omitted." *United States v. Pheaster*, 544 F.2d 353, 360 (9th Cir. 1976).

Here, the information readily cleared this low bar merely by alleging an agreement to commit an offense described in Chapter 63: specifically, that "Worthing and co-conspirators did willfully and knowingly combine, conspire, and agree with each other to violate Title 18, United States Code, Section 1341." ER33; ER36. In addition, far from omitting or imprecisely stating the elements of the object offense, the information further specified that the object offense consisted, *inter alia*, of "a scheme and artifice to defraud . . . by means of materially false and fraudulent pretenses, representations, and promises." *Id.* These statements, which tracked the language of Section 1341, more than sufficed to allege the scheme-to-defraud and materiality elements of the object mail-fraud offense; they "unambiguously set forth" the elements in question. *Davis*, 336 F.3d at 922. For the same reason, the mail-fraud-

conspiracy counts stood on their own, regardless of whether they incorporated the bid-rigging counts.[9]

For both reasons, the district court did not abuse its discretion in rejecting the alleged insufficiency of the information as a basis to withdraw the guilty plea.

III. WORTHING'S STANDALONE CLAIMS ALSO FAIL

Worthing fares no better in presenting (for the first time) the alleged insufficiency of the plea colloquy and the alleged insufficiency of the information as standalone claims. For the reasons stated in Sections

[9] Contrary to Worthing's contention, the government need not prove a specific misrepresentation to prove a scheme to defraud. *See, e.g., United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003) ("a defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved"; it "is only necessary to prove that it is a scheme reasonably calculated to deceive" (internal quotation marks omitted)). Worthing cites cases holding that the mail-fraud statute creates only one offense, Br. 42-43, but that holding—which predates *Woods*, *see Cleveland v. United States*, 531 U.S. 12, 26 (2000) (citing *McNally v. United States*, 483 U.S. 350, 358-59 (1987))—hardly means that the single offense cannot be committed in different ways. In any event, the information did allege specific misrepresentations, including that the conspirators "made materially false and misleading statements on records of public auctions that trustees relied upon to distribute proceeds" from properties sold at public auction in San Mateo and San Francisco Counties, respectively. ER33-34; ER36-37.

II.C-D *supra*, those claims fail on their merits, under any standard of review.[10]

Worthing's attack on the sufficiency of the information fails for the additional reason that any such attack was extinguished by his guilty plea. "An unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea." *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir. 2013). "[D]efects in [a charging document] do not deprive a court of its power to adjudicate a case," and thus "indictment omissions [do not] deprive a court of jurisdiction." *United States v. Cotton*, 535 U.S. 625, 630, 631 (2002). Worthing's guilty plea thus forecloses his instant arguments, all of which assert that the information either omitted elements of the mail-fraud-conspiracy offenses or failed to allege those counts with sufficient specificity. *See, e.g.*, *United States v. Wheeler*, 857 F.3d 742, 745 (7th Cir. 2017) ("an unconditional guilty plea waives any contention that an indictment fails

[10] Because Worthing did not press these claims as standalone claims below, any review should be, at best, for plain error. *See, e.g., United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002).

to state an offense"); *United States v. McCulley*, 605 F. App'x 658, 658 (9th Cir. 2015) (The defendant "waived any challenge to the sufficiency of the superseding information . . . by entering an unconditional guilty plea."); *United States v. Rowzee*, 550 F. App'x 452, 455 (9th Cir. 2013) ("Even assuming the Information is defective, [the defendant's] unconditional guilty plea waived any nonjurisdictional defects contained therein, including any failure to allege an element of a federal offense.").[11]

Worthing's arguments to the contrary (Br. 48-49) are unavailing. He cites *United States v. Leos-Maldonado*, 302 F.3d 1061 (9th Cir. 2002), for the proposition that a defective-indictment claim may be raised at any time, but in that case the defendant went to trial. *Id.* at 1063, 1064. He is correct that a guilty plea does not extinguish certain claims challenging "the Government's power to constitutionally prosecute [a defendant]," *Class v. United States*, 138 S. Ct. 798, 805 (2018) (internal quotation

[11] *See generally* 1A Charles Alan Wright et al., *Federal Practice and Procedure* § 172 (4th ed. 2008). ("It used to be the case that a defendant who pled guilty nonetheless could still appeal on the ground that the indictment or information failed to state an offense. But changes in the Supreme Court's view on jurisdiction, and an amendment to Rule 12, which now requires that such an argument be raised prior to trial, mean that a guilty plea now waives that challenge.").

marks omitted), but his arguments do not fall in that category. He is not, for example, challenging the constitutionality of the statute of conviction or raising a claim of double jeopardy or vindictive prosecution. *See id.*; *United States v. Chavez-Diaz*, -- F.3d --, 2020 WL 562292, at *4-6 (9th Cir. 2020). Rather, he simply complains that the mail-fraud-conspiracy charges were not detailed enough. Such complaints do not survive an unconditional guilty plea. *Class*, 138 S. Ct. at 805 (recognizing that guilty pleas extinguish claims that could have been "'cured' through a new indictment"); *Wheeler*, 857 F.3d at 745.[12]

IV. THE DISTRICT COURT DID NOT INTERFERE IN PLEA NEGOTIATIONS

Worthing contends (Br. 37) that the district court "intruded in plea negotiations," but that simply did not happen. Because the court had no

[12] Worthing suggests in a footnote (Br. 49 n.6) that, if his guilty plea does bar his attack on the information, the "logical conclusion" is that his original attorney must have been in ineffective in advising him to plead guilty. This undeveloped assertion does not present an issue for decision. *United States v. Strong*, 489 F.3d 1055, 1060 n.4 (9th Cir. 2007) ("The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal."). In any event, any claim of ineffective assistance of counsel would be premature. *See United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003).

involvement in the plea negotiations, there was no basis for Worthing's motions claiming violations of Rule 11(c)(1) and judicial interference in prosecutorial discretion. Charitably, the district court treated the motions as a request for reconsideration of its denial of his withdrawal motion. It did not abuse its discretion in denying that request.

1. The district court did not "participate in [] discussions" concerning the plea agreement, Fed. R. Crim. P. 11(c)(1), or usurp "the role of the executive," as Worthing contends, Br. 40. The parties negotiated the agreement independently, and, in June 2012, the court accepted the plea without commenting on the terms of the agreement. ER40-50. In 2017, the government offered to dismiss the mail-fraud-conspiracy charges (provided that Worthing replead to the bid-rigging charges), but Worthing declined the offer. ER107. The court disclaimed any involvement in those negotiations, stating at a status hearing that it "under[stood] that Mr. Worthing was offered the same deal [as other defendants], and chose not to do it. That's fine." ER94. The court likewise stated that it had "no opinion as to the merits of the [forthcoming] motion [to withdraw the guilty plea]," and that it would

"hear the motion and decide it." ER99. Later, in March 2018, the district court denied the withdrawal motion.

Stripped of its rhetoric, Worthing's argument is (again) that the district court should have allowed him to withdraw his guilty plea. Br. 34 (arguing that the court participated in plea negotiations "[b]y denying Mr. Worthing's motion to withdraw his plea"); Br. 39 (arguing that the denial of the withdrawal motion "made clear that any plea withdrawal was contingent on entrance into a new plea to bid-rigging charges"). In fact, it was Worthing who wanted (but did not receive) judicial intervention in the plea negotiations. Specifically, he argued that if the court denied his (forthcoming) withdrawal motion, "the government should be required to reinstate its [proposal]." SER64. Because there was no judicial interference in the plea negotiations or in the charging decision, there was no violation of Rule 11(c)(1) or the separation-of-powers doctrine.

The cases Worthing cites do not assist him. In *In re Bevin*, 791 F.3d 1096, 1103 (9th Cir. 2015), the district court repeatedly suggested that the parties add a term to the plea agreement and imposed conditions on its approval of the government's proposal to dismiss certain counts of the

indictment. In *United States v. Gonzalez-Melchor*, 648 F.3d 959, 965 (9th Cir. 2011), the district court negotiated an appellate waiver at sentencing, informing the defendant that it likely would sentence him more lightly if he agreed to the waiver. In *In re Morgan*, 506 F.3d 705, 710 (9th Cir. 2007), this Court observed that a district court's policy of refusing to accept single-count guilty pleas to multiple-count indictments could intrude on prosecutorial discretion by, *inter alia*, forcing prosecutors bring charges they ordinarily would not.[13] While a district court may be able to interfere in plea negotiations or prosecutorial discretion in "a number of ways" (Br. 36), the district court here did nothing of the kind.

2. Given the absence of a factual foundation for the motions, the district court properly treated them as a request for reconsideration. ER209. This Court reviews a denial of a motion for reconsideration for abuse of discretion. *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir.

[13] Contrary to Worthing's suggestion (Br. 40), judicial interference was not at issue in *Garcia-Aguilar v. U.S. District Court for the Southern District of California*, 535 F.3d 1021 (9th Cir. 2008). *Garcia-Aguilar* held only that the district court erred in finding that the defendants' plea colloquies were defective and declining to accept their guilty pleas on that basis. *Id.* at 1025-26.

2003). Reconsideration is appropriate only if there is newly discovered evidence, the court committed clear error, there is an intervening change in the controlling law, or "highly unusual circumstances" exist. *Id.* at 945 (internal quotation marks omitted). Worthing has not identified any such circumstances, and the district court did not abuse its discretion in denying his motions.

3. Moreover, even if the district court's actions could be construed as interference in plea negotiations or prosecutorial discretion (which they cannot), any error would be harmless. Rule 11(c)(1) addresses the "concern that a defendant might be induced to plead guilty rather than risk displeasing the judge who would preside at trial," *United States v. Davila*, 569 U.S. 597, 606 (2013), and thus there is harm only when there is a reasonable probability "that but for the improper judicial interference, the defendant would have proceeded differently," *United States v. Kyle*, 734 F.3d 956, 963 (9th Cir. 2013). Worthing is not complaining that the court's putative interference coerced him into pleading guilty or into taking any other action. Rather, he is merely upset that he was not granted the relief he requested nearly six years after pleading guilty.

V. THE FAR-BELOW-GUIDELINES SENTENCE WAS REASONABLE

The district court did not abuse its discretion in sentencing Worthing to a 30-day term of imprisonment, well below the applicable Guidelines range. Worthing appears to argue that his sentence was (1) procedurally unreasonable, contending that "no explanation was provided" for alleged "disparities," Br. 58; and (2) substantively unreasonable, contending that he received "a disparately harsh sentence," Br. 51. He is incorrect.

A. Background

At the sentencing hearing, which lasted more than half an hour, ER177-200, the district court explained that it would account for Worthing's "unique aspects," ER178, and sentence him in "a fair way," ER181. It treated Worthing "as if he ha[d] only been convicted of the crimes of bid rigging and not those of wire fraud," given the government's previous offer to dismiss those charges. ER179. It also gave Worthing credit for substantial assistance, even though the government, in its discretion, did not make a Section 5K1.1 motion. U.S.S.G. § 5K1.1; ER180-81. The court also stressed, however, the need for general

deterrence, explaining that a term of imprisonment could deter others from committing antitrust offenses. *See, e.g.*, ER187-90.

After hearing from Worthing and his counsel, the court sentenced Worthing to a 30-day term of imprisonment, to be followed by two years of supervised relief. ER179. This was well below the applicable Guidelines range of 12 to 18 months and the government's recommendation of 12 months. SER26-31. The court explained that the sentence was identical to that imposed on a "comparable" defendant involved in the big-rigging scheme. ER195. The court imposed (1) a criminal fine of $45,699, well below the statutory maximum; (2) restitution in the amount of $9,500, below the $15,000 stipulated in the plea agreement; and (3) a $400 special assessment. SER1-8; SER87.

The court stressed that it was not punishing Worthing for seeking to withdraw his guilty plea, describing Worthing's decision to bring that motion as "entirely appropriate." ER197. In fact, the court commended counsel for doing "a fine job." ER197.

B. Standard of Review

As with the conviction challenges discussed *supra*, this issue is not properly before the Court given Worthing's appellate waiver. Even if it

were, because Worthing failed to object at sentencing, this Court would review for plain error his claim that the district court procedurally erred by failing to adequately explain his sentence. *United States v. Valencia-Barragon*, 608 F.3d 1103, 1108 (9th Cir. 2010). This Court reviews the substantive reasonableness of a sentence "under a deferential abuse-of-discretion standard." *United States v. Maier*, 646 F.3d 1148, 1155 (9th Cir. 2011) (quoting *Gall v. United States*, 552 U.S. 38, 52 (2007)).

C. The Sentence Was Procedurally Reasonable

A sentence is procedurally reasonable unless "the district court committed significant procedural error," such as improperly calculating the Sentencing Guidelines range, failing to consider the 18 U.S.C. § 3553(a) factors, basing a sentence on clearly erroneous facts, or failing to explain adequately its sentence. *United States v. Apodaca*, 641 F.3d 1077, 1080-81 (9th Cir. 2011) (internal quotation marks omitted). The district court's explanation need only "set forth enough to satisfy the appellate court that the trial court judge considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 1081 (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)). Here, the district court explained its sentence

more than adequately at the robust sentencing hearing, *see* Section VI.A *supra*, and Worthing does not argue that the court failed to consider a relevant factor or erred in its Guidelines calculation or fact finding.

Worthing claims that the district court failed to "record an explanation" for supposed "disparities" (Br. 58), but there was no error—much less plain error. With two exceptions, the defendants who, in Worthing's view, received preferential treatment were sentenced *after* Worthing was sentenced. SER295-308; SER248-94. Worthing cites no authority that the court was obligated to (or reasonably could) address the sentences it would impose on other defendants in the weeks to come. As for the two exceptions, one defendant (Fung) received a longer term of imprisonment than Worthing, and the other defendant (Farag) received the same sentence as Worthing. SER295-308; SER248-94. The court even explained to Worthing that it was giving him the same sentence as Farag because he had a "comparable" role in the bid rigging. ER195.[14]

[14] In a pair of footnotes, Worthing quibbles about the volume of commerce to which he stipulated in his plea agreement. Br. 54 n.7, 55 n.9. He does not argue, however, and thus has waived any claim, *United States v. Lo*, 839 F.3d 777, 787 n.3 (9th Cir. 2016), that the district court erred by accepting the stipulated figure of $917,987. Nor could he, having affirmatively relied on that figure in arguing for leniency. *See* SER12

D. The Sentence Was Substantively Reasonable

Worthing's challenge to the substantive reasonableness of his sentence fails in law and fact. This Court "assess[es] whether the ultimate sentence is reasonable in light of the factors in 18 U.S.C. § 3553(a)." *United States v. Corona-Verbera*, 509 F.3d 1105, 1120 (9th Cir. 2007). These factors include, *inter alia*, "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). "Congress's primary goal in enacting § 3553(a)(6) was to promote national uniformity in sentencing rather than uniformity among co-defendants in the same case." *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007) (internal quotation marks omitted).

("Mr. Worthing's volume of commerce reached only $917,987."). In any event, Worthing is wrong to suggest that the figure resulted from an "inequitable plea negotiation process." Br. 54 n.7. To the contrary, as the government explained, the figure was negotiated to ensure that Worthing's volume of commerce would fall below the $1 million threshold that would have added two levels to his base offense level under U.S.S.G. § 2R1.1(b)(2). *See* SER21. Indeed, the figure reflected only *three* of his bid-rigging episodes—those in which he and his partners were the successful bidders; it did not reflect the *six* episodes in which he accepted payoffs for not bidding. *See* ER6-8 & n.1; PSR7

"When a district judge has considered the § 3553(a) factors and the totality of the circumstances," this Court "may not reverse just because [it] think[s] a different sentence is appropriate." *United States v. Blinkinsop*, 606 F.3d 1110, 1116 (9th Cir. 2010). Because a sentence within the Guidelines range will usually be reasonable, a below-Guidelines sentence, when challenged by a defendant, will usually be reasonable as well. *See, e.g.*, *United States v. Kahre*, 737 F.3d 554, 583 (9th Cir. 2013); *United States v. Bendtzen*, 542 F.3d 722, 729 (9th Cir. 2008).

Here, the district court considered the "unique aspects of Mr. Worthing's situation." ER178. The court viewed him as "comparable" to defendant Farag and gave him the same sentence. ER195. While noting the need for a prison term to promote general deterrence, the court imposed a term well below the Guidelines range. Because "the district court's decision shows that it rested on a reasoned basis and relied upon factors within its discretion," there was no abuse of discretion. *United States v. Edwards*, 595 F.3d 1004, 1018 (9th Cir. 2010).

Worthing makes no effort to show that the sentence was unreasonable in light of all of the § 3553(a) factors and the totality of the

circumstances. He complains about alleged disparities, but "[t]he need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing a sentence." *United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006). "Disparity in sentencing among co-defendants is not, by itself, a sufficient ground for attacking an otherwise proper sentence under the guidelines." *United States v. Townsend*, 98 F.3d 510, 513 (9th Cir. 1996) (internal quotation marks omitted); *see also United States v. Espinoza-Baza*, 647 F.3d 1182, 1195 (9th Cir. 2011) (different sentences for different defendants alone "is insufficient to establish that [a] sentence is unreasonable").

Worthing's argument also fails of its own accord, as he has not shown any "unwarranted" disparities. A sentence of 30 days' imprisonment—as opposed to 20 days, 15 days, 10 days, or even 2 years of probation—hardly qualifies as "abnormally harsh." Br. 53. In addition, Worthing's analysis ignores that many of the defendants sentenced to probation were required to spend time at a residential reentry facility. *See* SER227 (probation with 15 days at a residential reentry facility); SER203 (probation with 10 days at a residential reentry facility); SER151 (same); SER114 (same); SER126-27 (probation with 5

days at a residential reentry facility). The district court indicated that, in its view, confinement in such a facility is not an insignificant sanction. SER127 ("If anyone has been to 111 Taylor Street they will appreciate that 5 days probably will get the point across."); SER271.

Additionally, many of the other defendants had distinguishing characteristics. *See* 18 U.S.C. § 3553(a)(1) (court must consider "the history and characteristics of the defendant"). For example, the district court tailored individual sentences to account for health problems, age, family situation, or withdrawal from the conspiracy. SER137 (the defendant withdrew from the conspiracy and was elderly); SER188 (emotional and financial difficulties put the defendant "in a very bad place at the time [he] decided to enter into this conspiracy"); SER216 (court "concerned" about the defendant's "age and his health condition" which would create "a serious problem even if [he] were say to spend a day" in jail); SER151 (sentencing the defendant "consistent with [his] health conditions"); SER165-66 (the defendant "withdrew before [being] contacted by the FBI"); SER199 (the defendant's health "is a factor"); SER225 (sentence accounted for the defendant's age and health); SER243(the defendant "took responsibility at the beginning" and his

"circumstances [were] quite different from all the other defendants"); SER210 (the defendant has "led a life that is extraordinarily generous").

Worthing's bald speculation that he must have been "punished by the district court for his litigation in the year leading up to his sentencing" (Br. 57) is refuted by the record. The court informed Worthing that his efforts to withdraw his guilty plea had "no impact" on the sentence, ER185, and later reiterated that it made "no difference whatsoever in sentencing," ER197. In fact, the court stated that Worthing's actions were "entirely appropriate," and praised Worthing's attorney for doing "a fine job." ER197.

Nor was Worthing's sentence in any way "harsh." Br. 51. To the contrary, the district court endeavored to sentence him in a "fair way." ER181. It disregarded the mail-fraud-conspiracy charges for purposes of sentencing, and it gave Worthing credit for substantial assistance even though the government did not make a Section 5K1.1 motion. ER179; ER181. It imposed a sentence that was a twelfth of the Guidelines' advisory minimum and the government's recommendation. It accepted Worthing's argument that he was responsible for $9,500 in restitution, not the $15,000 he had agreed to in his plea agreement. ER180. And it

offered to recommend his preferred facility, and adjusted his report date so that he could be present for his daughter's first day of kindergarten. ER196-97.[15]

Finally, although Worthing contends that a probationary sentence is "compelled" (Br. 53), he was not eligible for probation given the mail-fraud-conspiracy convictions. *See* 18 U.S.C. §§ 1341 & 1349 (prescribing maximum penalty of 30 years' imprisonment if fraud conspiracy "affects a financial institution"); § 3559(a)(2) (classifying offenses carrying maximum term of imprisonment of 25 years or more as Class B felonies); § 3561(a)(1) (proscribing probation for individuals convicted of Class A or B felonies). In sum, this is not one of the "rare cases" in which a sentence is substantively unreasonable. *United States v. Christensen*, 828 F.3d 763, 821 (9th Cir. 2015) (internal quotation marks omitted).

[15] Worthing states that his sentence "suggests" an equal-protection violation. Br. 58. He has waived any such argument by failing to develop it. *United States v. Strong*, 489 F.3d 1055, 1060 n.4 (9th Cir. 2007). In any event, for the reasons discussed, he cannot show that the sentencing lacked a rational basis.

CONCLUSION

The Court should dismiss this appeal, or, in the alternative, affirm the district court's judgment.

Respectfully submitted.

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STATEMENT OF RELATED CASES

The government is not aware of any related cases, as defined in Rule 28-2.6, pending in this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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